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84-2030-ASX
Status: GRANTED

Title: Brown-Forman Distillers Corporation, Appellant
v.
New York State Liquor Authority

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June 28, 1985

Court: Court of Appeals of New York

Counsel for appellant: Flinn/MacDonald

Counsel for appellee: Fietkau/August Linford,
Constantine/Lloyd Edward

Entry	Date	Note	Proceedings and Orders
1	Jun 28 1985	G	Statement as to jurisdiction filed.
3	Jul 19 1985		Order extending time to file response to jurisdictional statement until August 30, 1985.
4	Aug 30 1985		Motion of appellees NY Liquor Authority to dismiss or affirm filed.
5	Sep 4 1985		DISTRIBUTED. September 30, 1985
6	Sep 23 1985	X	Reply brief of appellant Brown-Forman Distillers Corp. filed.
7	Oct 7 1985		PROBABLE JURISDICTION NOTED. limited to Question 2 presented by the statement as to jurisdiction. *****
8	Nov 1 1985	D	Motion of appellant to dispense with printing the joint appendix filed.
9	Nov 6 1985		Record filed.
10	Nov 12 1985		Motion of appellant to dispense with printing the joint appendix DENIED.
12	Nov 13 1985		Order extending time to file brief of appellant on the merits until December 2, 1985.
14	Dec 2 1985		Order extending time to file brief of appellee on the merits until January 13, 1986.
15	Dec 2 1985		Joint appendix filed.
16	Dec 2 1985		Brief of appellant Brown-Forman Distillers Corp. filed.
17	Dec 2 1985		Brief amicus curiae of The Wine Institute filed.
18	Dec 2 1985		Brief amicus curiae of United States Brewers Assn., et al. filed.
19	Dec 2 1985		Brief amicus curiae of Distilled Spirits Council of the United States filed.
20	Dec 2 1985		Appendix of Distillers Somerset Group, Inc filed.
21	Jan 7 1986		SET FOR ARGUMENT, Monday, March 3, 1986. (4th case)
22	Jan 10 1986	G	Motion of wine and Spirits Wholesalers of America, Inc. for leave to file a brief as amicus curiae filed.
23	Jan 13 1986	G	Motion of National Conference of State Legislatures, et al. for leave to file a brief as amici curiae filed.
24	Jan 13 1986		Brief of appellee NY Liquor Authority filed.
25	Jan 21 1986		Motion of wine and Spirits Wholesalers of America, Inc. for leave to file a brief as amicus curiae GRANTED. Justice Brennan OUT.
26	Oct 23 1986		LIQUIDATED.
30	Jan 27 1986		Motion of National Conference of State Legislatures, et al. for leave to file a brief as amici curiae GRANTED. Justice Brennan OUT.
1	Feb 8 1986	X	Reply brief of appellant Brown-Forman Distillers Corp.

Entry	Date	Note	Proceedings and Orders
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32	Mar 3 1986	filed. ARGUED.	
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JURISDICTIONAL

STATEMENT

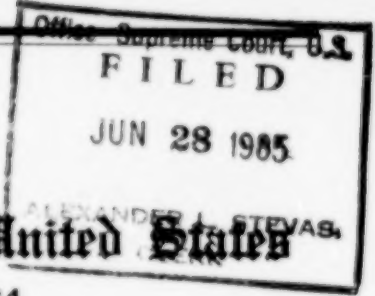
No. 84-

84-2030

IN THE

Supreme Court of the United States

October Term, 1984



BROWN-FORMAN DISTILLERS CORPORATION,

Appellant,

v.

STATE OF NEW YORK LIQUOR AUTHORITY,

Appellee.

On Appeal from the Court of Appeals of New York

JURISDICTIONAL STATEMENT

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Questions Presented

1. Do the lowest-price affirmation provisions of New York's Alcoholic Beverage Control Law—as applied by its State Liquor Authority to require that spirits be sold to New York wholesalers at lower prices than charged anywhere else because other states authorize distillers to grant lump sum promotional allowances which only New York prohibits and treats as price reductions—violate the Commerce Clause, particularly where the New York determination will force abandonment of such allowances in consequence of the interaction of the affirmation statutes of all the states, with the result that New York's ban on allowances will be extraterritorially imposed upon states which allow them?

2. Do the New York affirmation provisions, on their face, violate the Commerce Clause because they prospectively impose the price affirmed and charged to New York wholesalers as the lowest price which can thereafter be charged in all of the other states?

Designation of Parties

The appellee is identified in the caption appearing on the cover and at page one of this statement. Parent, subsidiary or affiliate companies of the appellant, Brown-Forman Distillers Corporation, are:

Brown-Forman Corporation
 Jack Daniel Distillery, Lem Motlow, Prop., Inc.
 Canadian Mist Distillers Ltd.
 Blue Grass Cooperage Company, Inc.
 The Jos. Garenau Co. S.A.
 Fratelli Bolla International Wines, Inc.
 Mt. Eagle Corporation
 Longworth, Ltd.
 Clintock, Ltd.
 Southern Comfort Corporation
 Jack Daniel International, Inc.
 Thoroughbred Plastics Corporation
 Early Times Distillers Co.
 B-F Brands, Ltd.
 Lenox, Incorporated

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No. 84-

IN THE

Supreme Court of the United States**October Term, 1984**

BROWN-FORMAN DISTILLERS CORPORATION,
Appellant,

v.

STATE OF NEW YORK LIQUOR AUTHORITY,
Appellee.

On Appeal from the Court of Appeals of New York**JURISDICTIONAL STATEMENT**

Appellant, Brown-Forman Distillers Corporation ("Brown-Forman"), appeals from the final judgment of the Court of Appeals of New York, dated April 2, 1985. The state court held that the lowest-price affirmation provisions of New York's Alcoholic Beverage Control Law ("ABC Law") do not violate the Commerce Clause of the United States Constitution either (1) by themselves and on their face or (2) as applied, in combination with other provisions of the ABC Law prohibiting discounts and allowances, by the appellee, the New York State Liquor Authority ("SLA"), to require Brown-Forman to sell to New York wholesalers at lower prices than those charged in all the other states with affirmation requirements. Al-

though the SLA refused to allow Brown-Forman to pay lump sum promotional allowances to New York wholesalers, the court upheld the agency's determination that those allowances "effectively" lower Brown-Forman's prices in the other affirmation states, which authorize them. Unlike New York, none of those other states treats the allowances as price reductions.

Opinions Below

The majority and dissenting opinions of the Court of Appeals are not yet officially reported. They appear in the appendix hereto, pp. 1a and 13a, *infra*.

The findings and determination of the SLA's hearing officer, adopted by the agency, are not reported but are included in the appendix, starting at p. 48a, *infra*. The decision of the Appellate Division of the New York State Supreme Court, confirming the SLA determination that Brown-Forman's allowances given elsewhere effectively reduced the prices of its brands below the levels affirmed in New York, thereby rendering its affirmations false, is reported at 100 A.D.2d 55, 473 N.Y.S.2d 420 (1st Dept. 1984). The majority and dissenting opinions of that court are reprinted at pp. 37a and 45a of the appendix.

Jurisdiction

The judgment of the Court of Appeals of New York was entered on April 2, 1985, together with its order of remittitur of the record to the Supreme Court, New York County. (35a)¹ The notice of appeal was filed on June 21, 1985. (55a)

1. Numbers in parentheses refer to pages of the appendix hereto.

This appeal is being docketed in this Court within 90 days from the entry of that final judgment below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

Constitutional Provisions and Statutes

U.S. Const., art. I, § 8, cl. 3:

"The Congress shall have Power . . . To regulate Commerce with foreign Nations and among the several States. . . ."

U.S. Const., amend. XXI, § 2:

"The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The pertinent provisions of the New York Alcoholic Beverage Control Law appear in the appendix, starting at p. 52a, *infra*.

Statement of the Case

Brown-Forman produces and imports distilled spirits. It sells its products in interstate commerce to independent wholesalers in more than 30 states, including New York."

Brown-Forman's Lump Sum Promotional Allowance Program

In 1978, the federal Bureau of Alcohol, Tobacco & Firearms ("BATF") approved Brown-Forman's request

2. Brown-Forman also sells its brands to the so-called "control states," where the state itself conducts the business in wine and/or spirits by performing the wholesale or retail functions.

to conduct a marketing and promotional program (the "Program") with its wholesalers. Brown-Forman's request followed issuance of BATF Ruling 77-17, in which that agency clarified its position and held that the Federal Alcohol Administration Act does not preclude a distiller's outright giving of compensation to wholesalers for promotional services or activities. The BATF approval of the Program was conditioned upon Brown-Forman's compliance with the following requirements:

a. The "sum given to the wholesaler is without any strings at all attached" and he will neither be told "how, where or when to spend the money, or on what brand he will spend it" nor will any accounting be requested from him.

b. The sum advanced to any wholesaler is neither dependent upon the number of cases of any brand he sells nor related to the price he pays for any brand.

c. Inasmuch as the wholesaler is not obligated to spend any money advanced in any particular way, Brown-Forman is not obligated to make repeated contributions and the plan can be cancelled by either party at any time.

Pursuant to the Program, Brown-Forman has paid promotional allowances to its wholesalers in both affirmation³ and non-affirmation states. Those promotional allowances are determined in annual lump sum amounts payable

3. The term "affirmation states" refers to approximately 20 states which have a law that requires a distiller to "affirm" that the prices at which it sells its brands to wholesalers in the affirmation state will be no higher than the lowest price at which it sells the same brands to wholesalers anywhere else in the United States during that period of time. New York was the first affirmation state, and the affirmation statutes of the other states have been patterned after and are administered in essentially the same way as New York's.

quarterly thereafter in the form of credit memoranda issued to the wholesalers.

Simply crediting the account of the wholesaler by a flat, lump sum amount, those memoranda advise him that the transaction is within the requirements of BATF Ruling 77-17, that Brown-Forman's program was approved by the BATF, and that the amount credited is "with no restriction by [Brown-Forman] or obligation by [the wholesaler] as to the use of these funds" and "is not related in any way to the number of cases of any [Brown-Forman] products sold nor is it in any way related to the price paid by you for these products."

The Program is designed to encourage and support the promotion of Brown-Forman's brands overall in achieving the most vigorous, effective competition possible with the brands of other distillers and suppliers. The allowances are used for a broad variety of promotional efforts⁴ in support of particular brands, all as determined by each wholesaler. One type of promotional activity for which the allowances have been used by wholesalers has been the discounting or "post-down" of prices to retailers. The allowances have varied from wholesaler to wholesaler even within a single state.

Following the BATF approval, Brown-Forman first obtained authorization from the Chairman of the Massachusetts Alcoholic Beverage Control Commission to con-

4. Wholesalers use the allowances for advertising, display, sales contests, placing point-of-sale materials, consumer samplings, improving brand and size representation in retail outlets, enhancing shelf position and facings, and all of the other activities designed to build consumer brand awareness and demand and to stimulate and sustain sales volume over the long term in competition with other brands.

duct the Program there. Brown-Forman also sought permission from the SLA to conduct the Program in New York. That agency refused its permission on the ground that § 101-b, subd. 2 of the ABC Law prohibits any allowances or inducements except specified quantity discounts and a discount for payment within a prescribed time. (52a) In Massachusetts and all the other affirmation states where the Program has been implemented, the prices affirmed and at which Brown-Forman has sold to wholesalers there have been identical to the prices affirmed in New York. Those prices have been the lowest at which Brown-Forman has sold anywhere.

No affirmation state other than New York has treated the lump sum allowances given to wholesalers either there or in other states as price reductions or discounts, and no other state has required that they be reflected in determining the lowest price affirmed for any Brown-Forman brand. Like New York, however, all of the other affirmation states require that, if a lower price is affirmed or charged anywhere else for a brand, its price must be lowered to the same level or its sale will be prohibited by their affirmation statutes.

The SLA Charges and Determination and Their Statutory Basis

The controlling provisions of New York's ABC Law are set forth, in pertinent part, in the appendix. (52a-54a) As a prerequisite to selling liquor in New York, they require a distiller to file a schedule with the SLA specifying for each brand and size its bottle and case price to wholesalers in New York. (ABC Law § 101-b, subd. 3(a)).

In addition, a lowest-price affirmation provision requires the distiller to affirm that the price filed is "no higher than the lowest price at which such item of liquor will be sold" elsewhere as long as that schedule is in effect. In determining "the lowest price for which any item of liquor" is sold elsewhere, "appropriate reductions shall be made to reflect . . . all rebates, free goods, allowances and other inducements of any kind whatsoever" given to any wholesaler "purchasing such item" elsewhere. (ABC Law, § 101-b, subds. 3(d), (g)).

Because of the lump sum promotional allowances granted in the other affirmation states, the SLA instituted a license revocation proceeding against Brown-Forman even though its affirmed prices in New York were identical to those affirmed elsewhere and were its lowest prices anywhere. The SLA charged that the allowances "effectively caused the price of [Brown-Forman] brands of liquor to wholesalers in other states to be lower than the price to wholesalers in New York State. . . ."

After a hearing and upon a stipulated fact record, the SLA's hearing officer, in a determination adopted by the agency, sustained those charges. Holding that it was "immaterial" that the lump sum allowances are not related to any particular brand, the SLA failed to specify how they could be allocated to individual Brown-Forman brands or otherwise be reflected in lower price affirmations in New York which the agency would find acceptable. The agency disclaimed authority to determine Brown-Forman's contention that sustaining the charges would effect an unconstitutional burden upon interstate commerce in violation of the Commerce Clause. (51a)

The Decision of the Court of Appeals

Brown-Forman instituted a proceeding to review and annul the adjudicatory determination of the SLA. In a four-to-one decision, the Appellate Division, First Department, of the New York State Supreme Court upheld the constitutionality of the ABC Law and confirmed the agency determination. (37a-47a) Brown-Forman then appealed to the state Court of Appeals, again urging that the SLA determination unreasonably burdened interstate commerce in violation of the Commerce Clause, as the dissenting justice in the Appellate Division had concluded. (45a-47a)

In another four-to-one decision, the Court of Appeals affirmed the judgment of the Appellate Division. The court first rejected Brown-Forman's contention that the lump sum allowances are merely compensation for promotional services and expenditures by the wholesalers and not discounts or reductions in price, because they are not tied to any particular brand and their amount, committed in advance for an entire year, is unrelated to and does not vary with the number of cases purchased. (1a-5a)

The majority of the state court also rejected Brown-Forman's arguments that, even if the lump sum allowances could be validly allocated to specific brands and reductions made in the affirmed prices which would be acceptable to the SLA, the statute and its application by the SLA contravene the Commerce Clause. Only those constitutional issues are raised on this appeal.

The majority ignored Brown-Forman's contention that in requiring lower prices than those affirmed anywhere else the SLA determination is discriminatory, economic pro-

tectionism, a virtually *per se* violation of the Commerce Clause. The majority labeled as "mere speculation" Brown-Forman's position that the inevitable effect of the SLA determination would be to force it to stop giving the lump sum allowances elsewhere and to lose the competitive benefits of the wholesaler promotional services they support. The SLA determination, Brown-Forman urged, would thus put New York in the posture of extraterritorially extending to other states, which permit them, New York's ban upon promotional and other allowances as the condition to a distiller's selling, in furtherance of its interstate business, to New York wholesalers. (10a-12a)

Further, the state court rejected Brown-Forman's argument that neither the Commerce Clause nor the Twenty-first Amendment allows New York to regulate liquor prices extraterritorially by imposing prospectively upon other states the minimum prices affirmed in New York. The court denied that claim of facial unconstitutionality, because it concluded (1) that the New York affirmation statute was not intended to discriminate against out-of-state business or to increase New York sales and tax revenues and (2) that its impact on commerce is slight. On that basis, the majority distinguished *United States Brewers Association, Inc. v. Healy*, 692 F.2d 275 (2d Cir. 1982), *aff'd mem.*, — U.S. —, 104 S. Ct. 265 (1983). (5a-10a)

The Questions Are Substantial

A. In Holding That The Affirmation Provisions Of New York's ABC Law As Applied By The SLA To Brown-Forman's Lump Sum Promotional Allowances, Coupled With The Refusal To Permit Them In New York, Do Not Violate The Commerce Clause, The State Court Of Last Resort Has Decided A Federal Question Of Substance In Conflict With The Applicable Decisions Of This Court

State regulation with either the purpose or the effect of benefiting local economic interests and discriminating against residents or business in other states is "protectionist." Under the Commerce Clause decisions of this Court, "where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected." *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

The unconstitutional economic protectionism may be shown by "proof either of discriminatory effect . . . or of discriminatory purpose. . . ." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 n.15, *reh'g denied*, 450 U.S. 1027 (1981); *Bacchus Imports, Ltd. v. Dias*, — U.S. —, 104 S. Ct. 3049, 3055 (1984).

Whenever state regulation seeks or effects an economic advantage for local residents at the expense of or by comparison with those in other states—even where the benefit for the local residents is merely price equality—that regulation offends the Commerce Clause. *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982) (unconstitu-

tional to require lower rates in New Hampshire for power generated out-of-state to extent utility exported cheap power generated in New Hampshire); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949).⁵

Here the SLA's equation of Brown-Forman's lump sum promotional allowances with a claimed reduction in the prices charged elsewhere and its requirement that the same prices affirmed in New York be lowered by some undefined amount to reflect that alleged reduction render New York's regulation fatally protectionist. That determination would close New York to all of Brown-Forman's brands unless it discriminates by charging lower prices there. Regardless of purpose, the effect is to bestow an economic benefit upon New York wholesalers. New York cannot constitutionally give such a preferred right of economic advantage over out-of-state buyers.⁶

The majority below ignored this discriminatory, protectionist result of the SLA determination. The dissenting judge, however, correctly characterized it:

5. The state court majority viewed discriminatory, economic protectionism as embodying only an intent "to protect local industry or discriminate against out-of-state enterprise" or a purpose to lower prices in order to increase in-state sales and generate increased tax revenues for the regulating state. (7a-9a) Such a restricted view is inconsistent with the cited decisions of this Court finding regulation unconstitutional which, in purpose or effect, discriminatorily protects consumers or buyers within the state.

6. Such discriminatory price reductions are tantamount to imposing an unconstitutional tax or added cost burden upon Brown-Forman's New York sales for which it receives nothing but the SLA's permission to sell in New York (elsewhere it receives the benefits of the promotional services which are supported by the lump sum allowances). *Cf. Toomer v. Witsel*, 334 U.S. 385, 403-404, *reh'g denied*, 335 U.S. 837 (1948).

"... In my view, the determination of the State Liquor Authority, and the provisions of the Alcoholic Beverage Control Law as thereby construed, impose an impermissible burden upon interstate commerce in violation of the Commerce Clause of the Federal Constitution. In effect, the determination upheld today requires that the prices charged to New York wholesalers be lower than the lowest prices charged to any wholesaler elsewhere in this country, by an amount equal to the value of any promotional allowances provided thereto but not to New York wholesalers, even where, as here, those same allowances were offered as well in New York but barred by the Authority as prohibited by state statute. Despite the majority's holding that the unconstitutional impact of the pricing requirement upon interstate commerce has not been demonstrated on the record beyond a reasonable doubt, in my view the obvious effects of that pricing requirement in practical operation cannot be gainsaid. . . ." (13a)

In *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, *reh'g denied*, 384 U.S. 967 (1966), this Court upheld the original version of the New York affirmation law (stayed pending conclusion of that litigation) against a purely facial challenge that it would unduly burden commerce. As the dissenting opinion below recognizes, not only did *Seagram* involve solely the facial analysis of a different affirmation provision, but in that case "there was no occasion to examine the operative effect of that [lowest price] requirement *together with* the other restrictions [upon allowances and the requirement that they be reflected in computing the lowest price] unique to [New York's] statutory scheme." (21a-22a) (Emphasis in opinion) This Court has never reviewed the effect upon

commerce of an affirmation requirement which, in combination with other restrictions, forces discriminatory, lower prices favoring buyers in the regulating state.

It is significant, however, that even in *Seagram*, the Court (citing *Baldwin v. Seelig, supra*) indicated that if New York's affirmation requirement should, upon its going into effect, in practice "produce higher prices in other States" such discriminatory effects on the business of distillers outside New York would run afoul of the Commerce Clause. 384 U.S. at 43. The attempt of the SLA to mandate lower prices for New York than the affirmation price charged in other states, solely to promote the economic welfare of New York wholesalers, retailers or consumers, is just such a violation of the Commerce Clause.

Brown-Forman argued below that even if this discriminatory, economic protectionist result of the SLA determination were disregarded, the inevitable effect of that agency's ruling is ultimately to force termination of the lump sum promotional allowances in all other states. Because no other state treats the lump sum allowances as price reductions or discounts, the lowest price requirements of all the other affirmation states would necessitate identical reductions in the prices charged there if any lower price were affirmed or charged in New York, even ostensibly to reflect lump sum allowances elsewhere.

The *ratio decidendi* of the SLA would then require further reductions in the price affirmed in New York, purportedly to reflect the "effective reductions" in the new, lower affirmed price level supposedly caused by the challenged promotional allowances granted elsewhere.

Ensnared in the on-going cycle of this "Catch-22" paradox, Brown-Forman or any other supplier would be unable to continue selling at a profit in any affirmation state. The SLA determination, therefore, would compel cessation of the allowances everywhere and put New York in the position of extraterritorially imposing upon other states, which permit them, New York's unique ban upon those allowances.

Although the majority of the state court recognized that no other affirmation state treats the lump sum allowances as price reductions or discounts,⁷ it ignored the clear consequences of that fact and disposed of the downward price spiral which would be precipitated by the other affirmation states in response to any lowering of the prices in New York as "mere speculation." By contrast, the dissenter correctly accepted the facts and necessary implications as to what the other affirmation states would do:

"The inevitable effect of [the SLA] determination that the promotional allowances permitted elsewhere are reductions in the affirmed prices would thus be to impose this state's proscription of such allowances upon a distiller's business practices in other states, or to force a distiller to choose between ceasing its business in New York or violating the affirmation laws elsewhere by lowering its prices here. Because other 'affirmation states' also mandate lowest prices, their requirements would necessitate identical reductions in

7. The majority accepted the fact of "... New York's unique treatment of the promotional allowances." It noted that "... no other state has required appellant to lower its affirmation price by virtue of the promotional allowances. . . ; New York alone refuses to allow appellant to conduct the program. . . ; and of all the affirmation states New York alone treats the credits as allowances to be taken into account in preparing the affirmed price schedule." (3a, 10a)

the prices charged there whenever reductions are effectuated in this state to reflect the allowances permitted elsewhere. . . . [A]ny supplier, such as petitioner, would ultimately be powerless to extricate itself from this seemingly unending quagmire and the rebounding impediment thus imposed on its interstate business.

"The only practical means by which a supplier could resolve the difficulties thus engendered by New York's statutory scheme as construed by [the SLA] would be to halt its promotional programs in all affirmation states or cease doing business in this state. . . ." (24a-25a)

Such extraterritorial extension to other states of New York's proscription of lump sum or other allowances unconstitutionally burdens commerce, even absent any economic protectionist element. *See, e.g., Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 380 (1976); *Edgar v. MITE Corp.*, 457 U.S. 624 (1982); *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 199 (1925).

Particularly is that true where the effect is to regulate prices in other states (as is the case here if, in fact, the lump sum promotional allowances are "price reductions," as found below). As this Court declared in the *Seelig* case, *supra*, "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state. . . ." 294 U.S. at 521, 524. Emphasizing that such price regulation is forbidden even when it is simply to achieve "a parity of prices between New York and other states" and even when its extraterritorial reach is by indirection, the Court declared that "commerce between the states is burdened unduly when one state regulates by

indirection the prices to be paid to producers in another. . . ." 294 U.S. at 524. See, also, *United States Brewers Association, Inc. v. Healy*, 692 F.2d 275, 279-280, 282-284 (2d Cir. 1982), *aff'd mem.*, — U.S. —, 104 S. Ct. 265 (1983).

Contrary to the position of the state court majority, any mere assumption that the other states might accommodate their affirmation requirements so as not to require matching the lower prices in New York mandated by the SLA ruling will not cure the unconstitutional burden on commerce created here.⁸ Even state regulation affected with a legitimate local interest (such as safety, health, prevention of fraud or temperance, none of which inheres in the affirmation and allowance provisions of the ABC Law⁹) which has not so directly usurped, undermined or destroyed the different standards of other states unduly burdens interstate business where the effect is no greater than incurring additional costs to comply with more stringent standards of the regulating state than those of other states. See, e.g., *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978).

8. As the dissenting judge accurately analyzed the majority's assumption, "Ultimately, unless every other affirmation state acquiesced in [New York's] computation of lowest prices, petitioner would, in effect, be forced to terminate its promotional programs in other states, thereby resulting in the exportation of [New York's] bar against promotional allowances." (28a)

9. The purpose of the New York provisions is solely economic (lower prices in New York); they are not "designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment. . . ." *Bacchus Imports, Ltd. v. Dias*, — U.S. —, 104 S.Ct. 3049, 3059 (1984).

There should be plenary review of the decision below not only because of its erroneous disposition of constitutional issues but also because of the importance of the impact it will have should it stand. In the highly regulated liquor industry, the decision affects the interaction of the differing regulatory systems of the various states, and it will have undesirable effects upon them.

If not overturned, that decision will compel the termination of promotional allowances by Brown-Forman and other suppliers in all the other states which allow them simply because New York alone prohibits them and New York alone views them as price reductions. On that unique basis, New York demands lower prices than charged anywhere else, in amounts undefined except that, patently, they must satisfy the unilateral determination of the SLA.

The effect of the decision below upon the other states will be the withdrawal of millions of dollars of promotional allowances which augment business and benefit residents there by supporting a broad variety of pro-competitive promotional services, tailored in kind and amount to the particular competitive and regulatory environment unique to each market.

B. In Holding That The Affirmation Provisions of New York's ABC Law Do Not Violate The Commerce Clause, On Their Face, The State Court Of Last Resort Has Decided A Federal Question Of Substance In Conflict With The Decision Of The Federal Court Of Appeals For The Second Circuit

Brown-Forman urged below that even if its lump sum promotional allowances could be rationally found to be price reductions which violate New York's affirmation re-

quirement, those provisions, on their face, violate the Commerce Clause and are not protected by the Twenty-first Amendment.

In 1981, Connecticut enacted a beer affirmation statute essentially identical to the amended New York liquor affirmation requirement at issue here.¹⁰ The United States Court of Appeals for the Second Circuit determined that the Connecticut statute, on its face, places an unconstitutional burden upon interstate commerce and is not saved by the Twenty-first Amendment. *United States Brewers Association, Inc. v. Healy*, 692 F.2d 275 (2d Cir. 1982), *aff'd mem.*, — U.S. —, 104 S. Ct. 265 (1983). The court held that neither the Twenty-first Amendment nor the Commerce Clause allows a state to regulate liquor sales or traffic outside its own territory, and found the price affirmation provisions, on their face, an impermissible burden on commerce, because they regulate prices to be charged not just in Connecticut but in the surrounding states as well. The court concluded:

“... [T]he extraterritorial thrust of the main beer price affirmation provisions . . . is plain, for those sections prevent a brewer from selling below the Connecticut wholesaler price to any wholesaler in any neighboring state. In other words, these sections

10. The Connecticut statute required an affirmation that the price to wholesalers there “will be no higher than the lowest price at which each such item of beer is or will be sold . . . to any wholesaler in any state bordering [Connecticut], at any time during the calendar month covered by such posting.” Connecticut Liquor Control Act, Conn. Gen. Stat. Ann. § 30-63b(b) (West Supp. 1984). Section 101-b(3)(d) of New York’s ABC Law provides that prices to wholesalers there will be “no higher than the lowest price at which such item of liquor will be sold . . . to any wholesaler anywhere . . . at any time during the calendar month for which such schedule shall be in effect. . . .” (53a)

tell a brewer that for any given month when it sells beer to a wholesaler in Massachusetts, New York, or Rhode Island, it may not do so at a price lower than that it has previously announced it will charge to Connecticut wholesalers. As the district court succinctly described it,

[b]ecause it is geared to the future, the Connecticut statute effectively sets minimum prices for the four-state area once the price is posted in Connecticut on the thirteenth of the month. . . .

“Thus, the obvious effect of the Connecticut statute is to control the minimum price that may be charged by a non-Connecticut brewer to a non-Connecticut wholesaler in a sale outside of Connecticut. Nothing in the Twenty-first Amendment permits Connecticut to set the minimum prices for the sale of beer in any other state,¹¹ and well-established Commerce Clause principles prohibit the state from controlling the prices set for sales occurring wholly outside its territory.” 692 F.2d at 282

The Second Circuit distinguished the decision in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, *reh’g denied*, 384 U.S. 967 (1966). There, solely on the

11. Analyzing the authorities which demonstrate that, however much the Twenty-first Amendment may limit the constraints of the Commerce Clause which inhibit state regulation of other goods, a state’s broad power to regulate the transportation or importation of alcoholic beverages granted by the Amendment extends only to those intoxicants destined for use within the state’s own borders, the Second Circuit unequivocally concluded:

“Notwithstanding the greater scope permitted to the states for regulation of traffic in intoxicating beverages, nothing in the Twenty-first Amendment suggests that a state may regulate the sale of liquor outside of its own territory. . . . We are aware of no authority to the effect that the Twenty-first Amendment modifies the traditional Commerce Clause principles that bar a state from regulating the transport, sale, or use of products outside of its own territory.” 692 F.2d at 281.

face of the statute as originally enacted in 1964, this Court sustained the constitutionality of New York's lowest-price affirmation requirement over claims that such regulation placed an illegal burden upon interstate commerce in violation of the Commerce Clause of the federal Constitution. As it was then, the New York affirmation statute required only that any price posted here must be "no higher than the lowest price at which such item of liquor was sold" anywhere in the country during the preceding month. 384 U.S. at 39-40, 54-55.

Thus, the original New York statute merely required the adoption there of prices previously determined elsewhere; it left suppliers free of any burden to adhere prospectively in other states to minimums extraterritorially fixed by New York's posting and affirmation obligations. This Court, therefore, recognized that the statute, as it was then, regulated prices only within New York. On that basis, the Second Circuit concluded in *Healy* that the holding of constitutionality in *Seagram v. Hostetter* was not controlling as to the kind of affirmation statute adopted by Connecticut:

"... The New York statute differed significantly from the Connecticut statute, because, unlike Connecticut's beer price affirmation provisions which control brewers' future conduct in the states surrounding Connecticut, the New York law in *Seagram* merely required that New York prices reflect what had been charged elsewhere in the past. Thus, the New York law, although it affected the prices that manufacturers would choose to set in other states, did not limit the freedom of a manufacturer at any given time to raise or lower prices in any other state." 692 F.2d at 283.

The Connecticut affirmation requirement was identical in its operation and effect to that adopted by New York after *Seagram v. Hostetter*. Since its amendment in 1967, the New York statute has required an affirmation that the price posted here will be no higher than "the lowest price at which such item of liquor will be sold . . . by any wholesaler anywhere . . . at any time during the calendar month for which such schedule shall be in effect. . . ." New York, like Connecticut, has effectively set the minimum price which can be charged in other states once the price to be charged in New York has been posted.

Just as *Healy* held that on its face "the Connecticut statute seeks to regulate prices . . . in its surrounding states as well" (692 F.2d at 282), so do the New York affirmation provisions, on their face, seek to regulate outside its borders by requiring future prices elsewhere to be no lower once a price is posted here. The Second Circuit decision, therefore, is equally applicable to New York's present affirmation statute. That decision squarely supports the conclusion that the statute, on its face, unconstitutionally burdens interstate commerce in contravention of the Commerce Clause and is not saved by the Twenty-first Amendment.

The state Court of Appeals incorrectly distinguished *Healy*, and the two decisions are in direct conflict, which should be resolved by this Court.

First, the majority below concluded that, while the purpose of the Connecticut statute was "to lower the retail price of beer in Connecticut, thereby increasing the purchase of beer by Connecticut residents within the state and

generating increased tax revenues for the state," there was no such discriminatory, economic protectionist intent behind New York's affirmation statute. (9a)

The *Healy* court, however, expressly rejecting the need to deal with any discriminatory legislative purpose, found the Connecticut "price affirmation provisions on their face an impermissible burden on commerce." 692 F.2d at 282. That court made it clear that, rather than any discriminatory intent on the part of the state, the extraterritorial effect apparent on the face of the Connecticut statute was sufficient to establish its unconstitutionality ("... the obvious effect of the Connecticut statute is to control the minimum price that may be charged . . . outside of Connecticut").¹² *Id.*

Second, the state court viewed "the impact of the New York statute on interstate commerce [as] slight in comparison with that of the Connecticut statute," (1) because the former "is nationwide in scope and imitated by approximately 20 other states" while the latter affected prices in only three adjacent states and (2) because liquor is allegedly more subject to state and federal price control than beer and thus not equally "susceptible to free price fluctuation." (9a-10a)

Compliance with the Commerce Clause, however, does not turn upon how many states have enacted a price affirmation statute or in how many others such statutes interfere

12. The Second Circuit noted further, "If the purpose or effect of a state's law is to regulate conduct occurring wholly outside the state, the burden on commerce is generally held impermissible, and the fact that the law may not have been intended as protectionist or discriminatory will not save it. . . ." 692 F.2d at 279.

with commerce by extraterritorially fixing minimums below which prices cannot go, regardless of free market forces. Counting numbers of states is beside the point. The *Healy* decision demonstrates that the issue is whether the statute of any state in fact regulates prices in any other.

Finally, the state court majority stated, "... the view that the effect of *Healy* upon statutes similar to that in issue [the present New York prospective affirmation requirement] is as yet unsettled is supported by Justice Stevens' concurring opinion to that effect . . ." in *United States Brewers Association, Inc. v. Rodriguez*, — U.S. —, 104 S. Ct. 1581, 1582 (1984). (8a) Reliance upon the opinion of Justice Stevens for that conclusion is misplaced.

The statute reviewed in *Rodriguez* was patterned after the original New York statute; it required affirmation of the lowest price charged anywhere during the *previous* month. Because the New Mexico Supreme Court had not passed on the validity of that state's new *prospective* statute, adopted in 1981, Justice Stevens concluded that this Court had "no occasion to consider whatever relevance *Healy* might have to a constitutional challenge of the 1981 Act. . . ." 104 S. Ct. at 1582

Even if the view of the court below were accurate, however, the "unsettled effect" of *Healy* upon the present New York statute would simply be further evidence of the substantiality of the questions raised on this appeal and the need for this Court to resolve any uncertainties. The constitutionality of affirmation provisions has been a recurring issue before this Court. Confusion appears to exist as to whether the *Healy* case and the earlier *Seagram*

decision are consistent and, if so, how they mesh and what is the full scope of *Healy*. Because the issue is likely to recur in state and lower federal courts, clarification and resolution by this Court are necessary.

The conflict between the decision below and *Healy* will heighten the uncertainty as to whether the affirmation statutes of states other than New York are constitutional. Liquor sales at wholesale approximate 15 billion dollars a year annually. Eighteen "control states" require lowest-price warranties essentially identical in effect to the requirements of the approximately 20 affirmation states. While conflict and uncertainty as to the status of the affirmation concept continue, therefore, billions of dollars of liquor sales each year are subject to a kind of monolithic, uniform and inflexible price regulation which sets a common floor in 38 states below which prices cannot respond to free market forces, including differing competitive exigencies varying from state to state. That ubiquitous, interwoven price regulation is effected not in the name of promoting temperance or any other goal arguably related to the Twenty-first Amendment but solely to achieve economic protectionism by assuring price parity to the residents of each regulating state.

Conclusion

For these reasons, the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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July 1, 1985

APPENDIX

Majority Opinion

STATE OF NEW YORK COURT OF APPEALS

In the Matter of

BROWN-FORMAN DISTILLERS CORPORATION,
Appellant,

v.

STATE LIQUOR AUTHORITY,
Respondent.

KAYE, J.

Appellant, Brown-Forman Distillers Corporation, on this appeal challenges both the State Liquor Authority's determination that it violated the lowest-price affirmation provisions of the Alcoholic Beverage Control Law, by failing to take into account promotional allowances given to wholesalers outside New York, and the constitutionality of the statute. We hold that the determination of the Authority was supported by substantial evidence and that the questioned provisions of the Alcoholic Beverage Control Law do not violate the Commerce Clause of the United States Constitution.

I

Section 101-b of the Alcoholic Beverage Control Law, prohibiting unlawful discriminations, requires every dis-

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tiller selling liquor in New York to file monthly with the Authority a schedule specifying the brand or trade name of each item, its container capacity, contents, age, proof, number of bottles per case and bottle and case price to wholesalers (Alcoholic Beverage Control Law, § 101-b[3][a]). With the schedule, the distiller must file an affirmation stating that the listed bottle and case prices will be "no higher than the lowest price at which such item of liquor will be sold . . . to any wholesaler anywhere in . . . the United States . . . at any time during the calendar month for which such schedule shall be in effect" (Alcoholic Beverage Control Law, § 101-b[3][d]). Appropriate deductions must be made from the scheduled and affirmed prices "to reflect . . . all rebates, free goods, allowances and other inducements of any kind whatsoever" given directly or indirectly outside New York (Alcoholic Beverage Control Law, § 101b[3][g]). The affirmation provisions have their genesis in the Moreland Commission report demonstrating that New York consumers were grossly discriminated against in liquor prices for national brands (*see* Moreland Commission Report No. 3, pp. 3-7). The requirement that all discounts be taken into account, itself originating as a response to disorderly and discriminatory pricing practices (*see* L 1942, ch. 899), is designed to assure that the affirmed price is the true price.

With the approval of the Bureau of Alcohol, Tobacco & Firearms, in all states in which it sells liquor except New York, appellant conducts a promotional program for its wholesalers. In New York the program is precluded by section 101-b(2)(b) of the Alcoholic Beverage Control Law, which permits only specified discounts. To encourage

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wholesalers to promote its brands, appellant provides lump-sum credits which are calculated annually and fixed for the year, based on the wholesaler's volume of past purchases and its sales projections for the coming year. The allowance to each wholesaler is computed on a per-case dollar figure, but since sales projections are used the figure does not necessarily correlate with the actual per-item discount. The allowance may be applied as the wholesalers see fit, although they are expected to discount their prices to retailers and in fact, as appellant stipulated, "the allowances have been used for price reductions or discounts to retail accounts on particular Brown-Forman brands or container sizes." While there are "no strings attached" for the wholesaler in its use of the credits, appellant is without obligation to continue providing them, and may terminate the promotional program as to any wholesaler at any time. Appellant conducts market studies to determine how wholesalers are using the credits, and considers how the credits are being used when fixing allowances for the following year. A wholesaler who does not use the allowance to promote Brown-Forman brands thus runs the risk of losing it for future years.

Approximately 20 states have enacted affirmation statutes patterned after New York's statute. Even where discounts must be reported, no other state has required appellant to lower its affirmation price by virtue of the promotional allowances.

The Authority, on stipulated facts, determined that the promotional credits were payments of the kind required by New York law to be taken into account in the affirmed price schedules (*see* Alcoholic Beverage Control Law, § 101-b[3]

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[g]), and that appellant's failure to reflect the credits on its schedules rendered the accompanying affirmations false. Appellant commenced this Article 78 proceeding to challenge that determination as well as the constitutionality of the affirmation statute. Special Term transferred the proceeding to the Appellate Division, which, with one Justice dissenting, confirmed the determination of the Authority, upheld the statute, and dismissed the petition. We now affirm.

II

Characterizing the allowances simply as costs incurred indirectly to promote its product line, appellant contends that there is no rational basis for the Authority's determination that the annual "no strings" promotional allowances are "rebates, free goods, allowances and other inducements of any kind whatsoever" (Alcoholic Beverage Control Law, § 101-b[3][g]), and that its failure to reflect the allowances on its affirmed price schedules did not constitute a violation of statute. According to appellant, the lump-sum allowances cannot be considered discounts because they are based in part on projections and do not correspond with actual quantities of product sold to wholesalers, rendering it impossible for precise per-item deductions to be made on the filed schedules.

The evidence considered by the Authority supported its conclusion that the allowances in practical application reduce the prices appellant charges wholesalers. Continued availability of the allowances is keyed to a wholesaler's purchases and its actual use of the credits. Appellant's wholesalers are expected to discount their prices, and in

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fact do so. The allowances are calculated on a per-case dollar figure. While that figure may not in fact correspond precisely to per-item discounts based on actual sales, projections are fixed by appellant with the wholesaler, based on experience and other factors, the obvious purpose being to make them accurate. Any real or apparent problem in ascertaining the precise per-item discount for purposes of the lowest-price affirmation is a difficulty built into the design of the program by Brown-Forman itself and cannot weigh in its favor. To hold otherwise would be to permit appellant to circumvent the affirmation provisions of the Alcoholic Beverage Control Law, when the program in effect reduces prices to wholesalers in other states.

The determination of the Authority that appellant's allowance is the functional equivalent of a discount and must be taken into account in the affirmation schedules is supported by substantial evidence, and therefore is sustained (*see 300 Gramatan Ave. Assoc. v. State Div. of Human Rights*, 45 NY2d 176, 181).

III

Appellant next contends that the statutory requirement that distillers affirm that they will not sell liquor to wholesalers in the State at a price lower than that at which the same item is being sold anywhere else in the nation contravenes the Commerce Clause of the Federal Constitution (US Const, art I, § 8). Preliminarily, we note that legislative enactments are presumptively constitutional (*see Montgomery v. Daniels*, 38 NY2d 41, 54-56; *Matter of Malpica-Orsini*, 36 NY2d 568, 570, *appeal dismissed* 423 US

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1042). To overcome the presumption, the party alleging unconstitutionality must demonstrate the existence of the infirmity beyond a reasonable doubt (*see Hotel Dorset Co. v. Trust for Cultural Resources of City of N.Y.*, 46 NY2d 358, 370). That presumption gains added force when coupled with the Twenty-First Amendment to the United States Constitution, which made control over alcoholic beverage trafficking a matter of policy judgment for the State legislature (*see New York State Liq. Auth. v. Bellanca*, 452 US 714, 718; *see generally* Note, The Effect of the Twenty-First Amendment on State Authority to Control Intoxicating Liquors, 74 Colum L Rev 1578; Comment, State Liquor Affirmation practices: Constitutional and Antitrust Problems, 77 Dick L Rev 643, 660-667). The declared policy of New York State is that it is necessary to regulate and control the manufacture, sale and distribution of alcoholic beverages (*see* Alcoholic Beverage Control Law, § 2; § 101-b), and the challenged provisions implement that legislative determination.

Appellant contends that section 101-b(3) of the Alcoholic Beverage Control Law constitutes an impermissible interference with interstate commerce because in a given month it restricts distillers' freedom to lower their wholesale prices in any state once the per-item price has been established for New York. Appellant argues that the first case involving a challenge to the New York affirmation statute in any form, *Joseph E. Seagram & Sons v. Hostetter* (16 NY 2d 47, *affd* 384 US 35)—which upheld its constitutionality—is distinguishable. *Seagram* was decided at a time when the affirmation requirement related to prices at which liquor items were sold in the month *immediately preceding* the

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month to which the schedule applied (*see* L 1967, ch 798 § 2). The current statute, relating as it does to future prices, has the effect, according to appellant, of fixing the floor for liquor prices for the month on a nationwide basis and therefore runs afoul of the Commerce Clause.

In determining whether a state statute impermissibly burdens interstate commerce, one of two approaches can be taken. When, as here, legitimate state objectives are credibly advanced in support of the statute, where no patent discrimination against interstate trade exists, and where there is only an incidental impact on interstate commerce, a flexible approach—one that takes into account the practical effect and relative burden on commerce—is employed (*see Philadelphia v. New Jersey*, 437 US 617, 623-624). It is only when "simple economic protectionism is effected by state legislation" that a stricter rule is applied (*Bacchus Imports, Ltd. v. Dias*, 104 S Ct 3049, 3055; *see also Minnesota v. Clover Leaf Creamery Co.*, 449 US 456, 471; *Lewis v. BT Inv. Managers*, 447 US 27, 36-37).

There is no contention that the New York statute was intended to protect local industry or discriminate against out-of-state enterprise. To the contrary, the affirmation statute was a response to the studied conclusions of the Moreland Commission, amply supported by empirical data, that New Yorkers were being charged unreasonably high prices for liquor as compared with citizens of other states (*see* Moreland Commission Report No. 3, pp 3-7; *see also Joseph E. Seagram & Sons v. Hostetter*, 16 NY2d 47, 53-55; *affd* 384 US 35, *supra*). The statute was enacted to end discrimination against New York customers.

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This history of discrimination, and the legitimacy of this State objective, are not controverted by appellant. Rather, appellant contends that the absence of discriminatory intent on the part of the New York Legislature in enacting the lowest-price affirmation provisions of the Alcoholic Beverage Control Law is irrelevant, and that the statute must be declared unconstitutional on its face, in view of *United States Brewers Assn. v. Healy* (104 S Ct 265, *affg without opinion* 692 F2d 275). The case, however, does not compel the conclusion urged by appellant.

Healy involved a challenge to the Connecticut Liquor Control Act requiring brewers to file beer-price schedules together with an affirmation that the prices posted within the state would be no higher than the lowest price at which the beer would be sold in any of the three bordering states (*see* 692 F2d at 276-277). The Supreme Court affirmed the decision striking down the statute without opinion, giving binding effect to the determination but not necessarily to the rationale employed by the Second Circuit (*see Mandel v. Bradley*, 432 US 173, 176; *Colorado Springs Amusements, Ltd. v. Rizzo*, 428 US 913 [Brennan, J., dissenting from denial of certiorari]; *Hicks v. Miranda*, 422 US 332, 344-345; *Edelman v. Jordan*, 415 US 651, 670-671; *see generally* Note, Summary Disposition of Supreme Court Appeals: The Significance of Limited Discretion and a Theory of Limited Precedent, 32 BUL Rev 373). Indeed, the view that the effect of *Healy* upon statutes similar to that in issue is as yet unsettled is supported by Justice Stevens's concurring opinion to that effect in *United States Brewers Assn. v. Rodriguez* (104 S Ct 1581, 1582 [Stevens, J., concurring in dismissal of appeal from 100 NM 216, 668 P2d 1293]).

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Moreover, a comparison of the statutes in this case and *Healy* demonstrates that neither the determination in *Healy* nor the Commerce Clause requires invalidation of the New York liquor-price affirmation statute.

First, it was undisputed in *Healy* that the purpose of the statute in question was "to lower the retail price of beer in Connecticut, thereby increasing the purchase of beer by Connecticut residents within the state and generating increased tax revenues for the state" (*United States Brewers Assn. v. Healy*, 692 F2d 275, 276, *affg* 532 F Supp 1312, 1316-1317, *supra*). The fact that the Connecticut statute was designed to discriminate against out-of-state businesses and protect local taxing interests, while the intent of the New York statute was to prevent continued discrimination against in-state consumers, is relevant to analysis of a statute under the Commerce Clause because of the higher level of scrutiny applicable to protectionist legislation (*see, e.g., Bacchus Imports, Ltd. v. Davis*, 104 S Ct. 3049, 3055-3057, *supra*; *Minnesota v. Clover Leaf Creamery Co.*, 449 US 456, 471, *supra*; *Philadelphia v. New Jersey*, 437 US 617, 624, *supra*). There was no showing that in either purpose or effect the New York statute advanced State revenue interests and discriminated against out-of-state businesses.

Second, the impact of the New York statute on interstate commerce is slight in comparison with that of the Connecticut statute. A statute that burdens commerce only incidentally will be upheld (*see, e.g., Kasal v. Consolidated Freightways Corp.*, 450 US 662; *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 US 366; *Pike v. Bruce Church*, 397 US 137, 142). The New York liquor-price affirmation stat-

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ute is nationwide in scope, and imitated by approximately 20 other states throughout the nation. The Connecticut statute was designed to affect and control regional prices in three targeted states, thereby creating an artificial disparity in interstate pricing. Third, *Healy* dealt with beer which unlike liquor—the price of which is already subject to state and federal control—is susceptible to free price fluctuation. Consequently, a statute stabilizing beer prices within four states necessarily has a greater, more direct impact on interstate commerce than a statute that is only one of a score of enactments relating to a commodity where prices already are highly regulated.

Appellant has not established beyond a reasonable doubt that the affirmation requirements of the Alcoholic Beverage Control Law are on their face unconstitutional, or that the legislative determination to regulate the sale and distribution of alcoholic beverages in this fashion should be overridden.

IV

Finally, appellant asserts that the affirmation statute is unconstitutional as applied to the particular facts and circumstances of this case because of New York's unique treatment of the promotional allowances.

New York alone refuses to allow appellant to conduct the program, because the discounts are not within section 101-b(2)(b) of the Alcoholic Beverage Control Law, and of all the affirmation states New York alone treats the credits as allowances to be taken into account in preparing the affirmed price schedule. According to appellant, if it is required to reduce its schedule prices by the allowances, the resulting price would necessarily become the "lowest price"

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for purposes of other states' affirmation status. Since those states mandate adherence to the lowest price in the country, but have themselves chosen not to prescribe that the promotional allowance be considered in determining in-state prices, the wholesale price in those states would have to be reduced to match New York's. New York would then require still another reduction in schedule prices to reflect the new "lowest" out-of-state price, and so on. Appellant urges that this downward spiral would ineluctably lead to discontinuance of the promotional program in all states—an impermissible, direct interference with interstate commerce.

In making this argument, appellant assumes, and properly so, that other states will enforce their liquor laws. But appellant also requires us to assume that other states will enforce their laws without regard for reality, and this we are unwilling to do.

In analyzing state statutes challenged under the Commerce Clause, "[t]he principal focus of inquiry must be the *practical operation* of the statute, since the validity of state laws must be judged chiefly in terms of their *probable effects*" (*Lewis v. BT Inv. Managers*, 447 US 27, 37, *supra* [emphasis supplied]). No other affirmation state has required reduction of the affirmed price by virtue of appellant's promotional programs being conducted there. However, wholesalers in those states, unlike New York, are actually receiving the promotional benefits and passing them along where appropriate to retailers. It is certainly reasonable to expect that other states will recognize that the prices on appellant's New York schedules have been adjusted, because of New York's statutory requirements, to

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take into account the effect of credits enjoyed by wholesalers elsewhere—credits which the other states receiving the tangible benefits of appellant's program apparently have already chosen not to consider in determining the affirmed price.

Appellant has failed to demonstrate beyond a reasonable doubt that the threatened mechanical application of liquor laws by other affirmation states will occur or that a downward price spiral would be precipitated. It would require us to engage in mere speculation were we to declare, on such a tenuous basis, the lowest price affirmation statute unconstitutional as applied (*see Joseph E. Seagram & Sons v. Hostetter*, 384 US 35, 43, *supra*; *Matter of Admiral Wine & Liq. Co. v. State Liq. Auth.*, 61 NY2d 858, 861).

V

Accordingly, the judgment of the Appellate Division dismissing the petition should be affirmed, with costs.

Court of Appeals Dissenting Opinion

JASEN, J. (dissenting):

I respectfully dissent. In my view, the determination of the State Liquor Authority, and the provisions of the Alcoholic Beverage Control Law as thereby construed, impose an impermissible burden upon interstate commerce in violation of the Commerce Clause of the Federal Constitution. In effect, the determination upheld today requires that the prices charged to New York wholesalers be lower than the lowest prices charged to any wholesaler elsewhere in this country, by an amount equal to the value of any promotion allowances provided thereto but not to New York wholesalers, even where, as here, those same allowances were offered as well in New York but barred by the Authority as prohibited by state statute. Despite the majority's holding that the unconstitutional impact of the pricing requirement upon interstate commerce has not been demonstrated on the record beyond a reasonable doubt, in my view the obvious effects of that pricing requirement in practical operation cannot be gainsaid. (Cf. *Boston Stock Exchange v. State Tax Comm.*, 429 US 318, 330-331; *Best & Co. v. Maxwell*, 311 US 454, 456; *Western Oil and Gas Assn. v. Cory*, 726 F2d 1340, 1342.) It will simply be impossible for distillers to comply with the lowest price laws of other states, as well as New York's, unless the distillers discontinue their allowances in those other states—thereby effectively exporting New York's prohibition (*see United States Brewers Assn. v. Healy*, 692 F2d 275, 279, *aff'd* 104 S Ct 265; *Baldwin v. G.A.F. Seelig*, 294 US 511, 524)—or unless the other states decide to permit an exception in their affirmation laws for the lower prices in New York. I cannot agree with the majority that this state's pricing re-

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quirements can withstand constitutional challenge on the mere presumption that their logic will be recognized by the other states who will then acquiesce therein. (See *Kassel v. Consolidated Freightways Corp.*, 450 US 662, 665; *A & P Tea Co. v. Cottrell*, 424 US 366, 380.) Additionally, while I believe that the administrative determination should be vacated, I would construe the statutory provisions upon which it was predicated by limiting their reach in such a manner as would avoid the constitutional infirmity while at the same time preserving, in substantial part, the legislative intent. (See *People v. Epton*, 19 NY2d 496, 505, *cert. den.* 390 US 29 *United States v. Jim Fucy Moy*, 241 US 394, 401.)

The following facts are not in dispute. Petitioner, Brown-Forman Distillers Corporation, is a Delaware corporation engaged in the business of producing and importing distilled spirits which it sells in interstate commerce to private wholesalers in more than thirty states, including New York, as well as to "control states" which themselves conduct the wholesale and retail business within their own boundaries. Petitioner is qualified to transact business in New York State, has offices in Manhattan and White Plains, and holds liquor licenses for both premises.

In May 1978, the Federal Bureau of Alcohol, Tobacco and Firearms (BATF) approved petitioner's request for permission to conduct a marketing and promotional program with each of its wholesalers in the various states. BATF, which had decided the previous year that the Federal Alcohol Administrative Act does not prohibit distillers from compensating wholesalers with allowances for promotional services or activities (BATF Bulletin 77-17),

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conditioned its approval upon petitioner's compliance with certain requirements, including the following: (1) that the sums to the wholesalers were to be given without any obligations to spend any amount in a particular way or to submit to an accounting; (2) that the allowances would not be contingent upon the prices paid by the wholesalers or their volume of sales; and (3) that the promotional plans could be cancelled by petitioner or the respective wholesaler at any time.

Following receipt of BATF approval, petitioner obtained approval from several states to conduct its promotional allowance program with the wholesalers therein. Among those states was Massachusetts whose Alcoholic Beverage Control Commission granted permission to petitioner, who then began the program there in fiscal year 1980. In Massachusetts, as in other so-called "affirmation states" which require distributors to affirm that their prices to wholesalers are the lowest they charge to wholesalers anywhere else, petitioner has supplied alcoholic beverages at its affirmed lowest prices. The individual affirmed prices have not been discounted to reflect the value of any promotional allowances petitioner has provided to wholesalers, but merely state the specific amounts charged for each particular item.

These prices are identical to those which petitioner has charged in New York. Indeed, as required by statute, petitioner has filed schedules of prices with respondent, the State Liquor Authority, and, since May 1979, has affirmed that the prices to wholesalers of brands of liquor set forth were no higher than would be sold to wholesalers in any other state.

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However, in this state, petitioner has not been permitted to provide wholesalers with such promotional allowances as petitioner has given to wholesalers in Massachusetts and elsewhere. Although petitioner had sought to conduct its BATF-approved promotional program in this state, permission to do so was refused by respondent by reason of the Alcoholic Beverage Control Law which prohibits any allowances or inducements except quantity discounts and discounts with payment within a prescribed time. Consequently, although the petitioner's affirmed prices to wholesalers in New York have been equal to the lowest that it has charged elsewhere, wholesalers in this state have not been afforded the benefits of petitioner's promotional allowances.

In May 1981, respondent served petitioner with a statement of charges alleging violations of this state's "affirmation statute", i.e., Alcoholic Beverage Control Law section 101-b(3), for selling alcoholic beverage products to wholesalers in New York at prices higher than elsewhere. Specifically, respondent charged that although petitioner had affirmed, pursuant to the statute, that its price for each brand of liquor to wholesalers in this state "would be no higher than the lowest price at which such brands of liquor would be sold by [petitioner] to wholesalers in any other state", nevertheless, petitioner had "provided allowances and/or inducements to wholesalers in other states which effectively caused the price of those brands of liquor to wholesalers in those other states to be lower than the price to wholesalers in New York State." At the administrative hearing that followed, petitioner conceded that it had made lump sum payments under its promotional program to

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wholesalers in other states, and that it had not lowered its affirmed prices to New York wholesalers to reflect a proportionate discount.

The Hearing Officer sustained the charges against petitioner, holding in pertinent part:

"I further find it significant [that] the method of promotion utilized by [petitioner], consisting of a monetary allowance, was utilized in part by the wholesalers to provide 'Post Downs' [i.e., selected price reductions]. I further find that the promotional allowances amounted to a discount by the licensee to the wholesaler, thereby decreasing the price by Brown-Forman to wholesalers in Massachusetts.

The promotional funds used by wholesalers as 'Post Downs' effectively lowered the price to wholesalers in Massachusetts below the affirmation price in New York. It is immaterial that the promotional funds were not designed for any particular brand name of [petitioner].

I further find that [petitioner's] method of promotion was in effect a method designed to circumvent the New York State Alcoholic Beverage Control Law and did violate Section 101-b, subdivision 3(a)(d)(g) of the Alcoholic Beverage Control Law."

Finally, the Hearing Officer noted petitioner's contention that Alcoholic Beverage Control Law as thus applied would violate the commerce clause of the Federal Constitution, but he disclaimed authority to make such a determination.

Respondent adopted the findings and conclusions of the Hearing Officer and imposed penalties of a ten-day suspension and forfeiture of a \$20,000 bond on each of petitioner's

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two licenses. The suspensions were deferred subject to imposition within one year should respondent be satisfied that petitioner had not taken measures "to assure the proper conduct of the licensed premises." Payment on the bonds, however, was required notwithstanding that deferment.

Petitioner commenced this Article 78 proceeding challenging respondent's determination on the grounds that the administrative findings were not supported by substantial evidence in the record and that respondent's application of the affirmation statute impermissibly burdens interstate commerce. The proceeding was transferred to the Appellate Division, which, with one justice dissenting, confirmed respondent's determination. The court held that the record supported respondent's finding that "petitioner's promotional program, which is not reflected in its price schedules filed with [respondent], effectively *reduces* the actual liquor prices it charges in other states below the prices that it charges New York wholesalers." [Emphasis in original.] The court also rejected petitioner's commerce clause contention, holding that "New York's affirmation statute has no impact on petitioner's allowance program and does not dictate out-of-state discounts."

While agreeing with the majority that there is substantial evidence in the record to support respondent's factual conclusions, I cannot concur that respondent's determination, and the pricing requirement thereby imposed, will have but a slight and remote impact upon interstate commerce. Rather, it seems virtually inescapable to me that the effect will be to interfere substantially with petitioner's and other distillers' business practices in other states in

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violation of the Federal Commerce Clause. Accordingly, I would reverse the judgment of the Appellate Division and vacate respondent's determination.

New York's affirmation statute, Alcoholic Beverage Control Law section 101-b(3), provides that a distiller must file with respondent both a schedule of its prices to wholesalers and an affirmation that the price of each of its products as set forth in such schedule is no higher than the lowest price at which the product will be sold in any other state during the month in which the schedule is in effect.¹ The

1. Alcoholic Beverage Control Law section 101-b(3)(a) and (d) provides in pertinent part:

"3. (a) No brand of liquor or wine shall be sold to or purchased by a wholesaler, irrespective of the place of sale or delivery, unless a schedule, as provided by this section is filed with the liquor authority, and is then in effect. Such schedule shall be in writing duly verified, and filed in the number of copies and form as required by the authority, and shall contain, with respect to each item, the exact brand or trade name, capacity of package, nature of contents, age and proof where stated on the label, the number of bottles contained in each case, the bottle and case price to wholesalers, the net bottle and case price paid by the seller, which prices, in each instance, shall be individual for each item and not in 'combination' with any other item, the discounts for quantity, if any, and the discounts for time of payment, if any. Such brand of liquor or wine shall not be sold to wholesalers except at the price and discounts then in effect unless prior written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter * * * *

(d) There shall be filed in connection with and when filed shall be deemed part of the schedule filed for a brand of liquor pursuant to paragraph (a) of this subdivision an affirmation duly verified by the owner of such brand of liquor, or by the wholesaler designated as agent for the purpose of filing such schedule if the owner of the brand of liquor is not licensed by the authority, that the bottle and case price of liquor to whole-

(footnote continued on next page)

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affirmation requirement of the precursor to the present statute, originally enacted in 1964 and differing only in its requirement that the referenced lowest prices be those charged anywhere in the nation during the month *preceding* the schedule then in effect (L 1964, ch 531, § 9), was challenged twenty years ago, shortly after its enactment, on grounds that it violated the commerce clause. This court upheld the affirmation provisions, noting that its decision was predicated on the “reasonable * * * expect[ation] that the statute *would be administered* consistently with its sole purpose to regulate the *intrastate* sale of liquor.” (*Joseph E. Seagram & Sons, Inc. v. Hostetter*, 16 NY2d 47, 59, *aff’d* 384 US 35 [emphasis added].) Likewise, the Supreme Court, in affirming this court’s holding, emphasized that, inasmuch as the affirmation requirement had been stayed, it was deciding only “the constitutionality of *those provisions on their face*.” (384 US 35, 41 [emphasis added].)

It is true that the Supreme Court declared that “[a]s part of its regulatory scheme for the sale of liquor, New York may constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered

salers set forth in such schedule is no higher than the lowest price at which such item of liquor will be sold by such brand owner or such wholesaler designated as agent, or any related person, to any wholesaler anywhere in any other state of the United States or in the District of Columbia, or to any state (or state agency) which owns and operates retail liquor stores (i) at any time during the calendar month for which such schedule shall be in effect, and (ii) if a like affirmation has been filed at least once but was not filed during the calendar month immediately preceding the month in which such schedule is filed, then also at any time during the calendar months not exceeding six immediately preceding the month in which such schedule shall be in effect and succeeding the last calendar month during which a like affirmation was in effect * * * .”

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elsewhere in the country.” (*Id.* at p. 43.) But the Court made clear that it was confronted in that case with mere conjecture as to the extra-territorial impact of the *affirmation requirement considered alone*, and with the purely speculative interference with interstate commerce alleged by the statute’s challengers. The Court, which concluded by warning that “specific future applications * * * may engender concrete problems of constitutional dimension” (*id.*, at p. 52), noted that:

“We need not now decide whether the mode of liquor regulation chosen by a state in such circumstances could ever constitute so grave an interference with a company’s operations elsewhere as to make the regulation invalid under the Commerce Clause. See *Baldwin v. G.A.F. Seelig*, 294 U.S. 511. No such situation is presented in this case * * * . The serious discriminatory effects of [the affirmation requirement] alleged by appellants on their business outside New York are largely matters of conjecture. It is by no means clear, for instance, that [the affirmation requirement] must inevitably produce higher prices in other States, as claimed by appellants, rather than the lower prices sought for New York. *It will be time enough to assess the alleged extraterritorial effects of [the affirmation requirement] when a case arises that clearly presents them.*” (*Id.* at pp. 42-43 [emphasis added].)

Indeed, this case now presents additional considerations which give rise to the “extraterritorial effects” left unexamined in *Seagram*. In that case, clearly there was an evaluation only of the effect upon interstate commerce of the requirement for an affirmation of lowest prices *per se*. There was no occasion to examine the operative effect of

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that requirement *together with* the other restrictions unique to this state's statutory scheme. Specifically, unlike *Seagram*, this appeal involves not only the requirement for affirmation of lowest prices (Alcoholic Beverage Control Law § 101-b(3)(d)), but also the ramifications of that requirement when combined with the prohibition of rebates, allowances and other inducements to wholesalers in this state (§ 101-b(2)(b))² and the computation of "lowest price" as reflecting all such rebates, allowances and inducements which are provided to wholesalers elsewhere (§ 101-b(3)(g))³. In *Seagram*, in the absence of any obvious bur-

2. Alcoholic Beverage Control Law section 101-b(2)(b) provides:

"2. It shall be unlawful for any person who sells liquors or wines to wholesalers or retailers * * * *

(b) to grant, directly or indirectly, any discount, rebate, free goods, allowance or other inducement of any kind whatsoever, except a discount not in excess of two percentum of quantity of liquor, a discount not in excess of five percentum for quantity of wine and a discount not in excess of one percentum for payment on or before ten days from date of shipment."

This statutory provision, with some minor differences, was enacted prior to the affirmation requirement (see L. 1942, ch 899) and was in effect at the time the latter was challenged in *Seagram*. It was not, however, at issue in that case.

3. Alcoholic Beverage Control Law section 101-b(3)(g) provides in pertinent part:

"(g) In determining the lowest price for which any item of liquor was sold in any other state or in the District of Columbia, or to any state (or state agency) which owns and operates retail liquor stores, appropriate reductions shall be made to reflect all discounts in excess of those to be in effect under such schedule, and all rebates, free goods, allowances and other inducements of any kind whatsoever offered or given to any such wholesaler or state (or state agency) as the case may be, purchasing such item in such other state or in the District of Columbia; provided that nothing contained in paragraphs (d) and (e) of this subdivision

(footnote continued on next page)

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den upon interstate commerce, this state's effort to insure liquor price parity *solely* by requiring affirmation of the lowest prices charged the previous month in other states was held not to be unconstitutional on its face. Here, other critical factors are present.

First, petitioner offered to provide promotional allowances to wholesalers in this state but was refused by respondent by reason of the prohibition contained in Alcoholic Beverage Control Law section 101-b(2)(b). Thereafter, because petitioner provided the very same promotional allowances to wholesalers in other states where they were not prohibited, respondent charged petitioner with and determined it to be guilty of lowering its prices to those wholesalers in violation of the affirmation requirement of section 101-b(3)(d). Respondent's determination, therefore, necessarily requires more than that petitioner sell to wholesalers in this state at prices as low as those charged elsewhere. In effect, the determination also requires either that the prices petitioner charges to New York wholesalers be actually lower than those charged elsewhere, by an amount equal to the value of the promotional allowances permitted elsewhere, or that those promotional allowances, which are not permitted in this state, be discontinued elsewhere to avoid the price disparity with other affirmation states which

shall prevent differentials in price which make only due allowance for differences in state taxes and fees, and in the actual cost of delivery * * * *

This statutory provision, intended to preclude fictitious list prices which were disregarded in practice by means of granting discounts to favored customers, was not in effect at the time of *Seagram*. It was not enacted until 1967, when the Legislature amended the affirmation law to make *current* prices elsewhere the reference for lowest prices. (See L. 1967, ch 798.)

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would otherwise arise from petitioner's being required to lower its prices in New York.

The inevitable effect of respondent's determination that the promotional allowances permitted elsewhere are reductions in the affirmed prices would thus be to impose this state's proscription of such allowances upon a distiller's business practices in other states, or to force a distiller to choose between ceasing its business in New York or violating the affirmation laws elsewhere by lowering its prices here.⁴ Because other "affirmation states" also mandate lowest prices, their requirements would necessitate identical reductions in the prices charged there whenever reductions are effectuated in this state to reflect the allowances permitted elsewhere. In turn, under this state's affirmation statute, further reductions would be required in the prices affirmed here in order to reflect the newly lowered prices elsewhere as "effectively reduced" by the value of the allowances provided in those states. This vicious cycle would again be triggered, and the laws of the other affirmation states would require another equivalent reduction in the prices charged there. Indeed, any supplier, such as petitioner, would ultimately be powerless to extricate itself from this seemingly unending quagmire and the rebounding impediment thus imposed on its interstate business.

4. There are approximately 20 so-called "affirmation states" which have laws requiring distillers to "affirm" that the prices at which they sell brands to wholesalers in the state be no higher than the lowest prices at which they sell the same brands elsewhere during that period of time. The affirmation statutes have been patterned after New York's, but the others do not contain what is apparently unique to this state, a proscription against promotional or other allowances of any kind whatsoever.

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The only practical means by which a supplier could resolve the difficulties thus engendered by New York's affirmation statutory scheme as construed by respondent would be to halt its promotional programs in all affirmation states or cease doing business in this state. Under these circumstances, the lowest price requirements imposed by respondent unduly burden the free flow of interstate commerce in violation of the Federal Commerce Clause by forcing the extension, albeit by indirection, of this state's proscription of promotional allowances to other states which permit them, to the detriment of the interstate business of petitioner and other suppliers of alcoholic beverages. (See *Great Atlantic & Pacific Tea Co. v. Cottrell*, *supra*, at p. 380; *United States Brewers Assn. v. Healy*, *supra*; cf. *Seagram v. Hostetter*, *supra*, at p. 43.)

Of course, this burden upon interstate commerce might be avoided altogether, as the majority presumes it will be, if every affirmation state conformed its laws and regulations to New York's requirements as imposed by respondent, or if every such state simply accepted New York's treatment of out-of-state allowances and inducements as price reductions and, consequently, chose not to insist upon equivalent reductions in their own required "lowest prices". But a state law or regulation is not saved from constitutional infirmity under the Federal Commerce Clause by the mere possibility that other states might acquiesce or conform their own laws thereto—even if the law or regulation in question is otherwise a reasonable and legitimate exercise of state police power. (See, e.g., *Kassel v. Consolidated Freightways Corp.*, *supra*, at p. 671; *Raymond Motor Transportation, Inc. v. Rice*, 434 US 429, 432; *Great Atlantic &*

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Pacific Tea Co. v. Cottrell, *supra*, at p. 380; *Bibb v. Navajo Freight Lines*, 359 US 520, 529-530; *Southern Pacific Co. v. Arizona*, 325 US 761, 779; *Baldwin v. G.A.F. Seelig*, *supra*, at p. 524.) This is especially true where uniformity of regulation among the states is necessary, such as here, regarding the determination of required lowest prices, if the free flow of trade is not to be hampered severely. (See *Huron Cement Co. v. Detroit*, 362 US 440, 444; *Southern Pacific Co. v. Arizona*, *supra*, at pp. 767, 770-771; cf. *Minnesota Rate Cases*, 230 US 352, 399-400; *Cooley v. Board of Wardens*, 12 How 299, 319.)

A state may not regulate commerce, albeit within its own territory, where the inevitable effect is to dictate commercial practices beyond its boundaries. (*Southern Pacific Co. v. Arizona*, *supra*.) This is so, even where the state regulation is in furtherance of a legitimate government interest, whenever the burden on commerce arises from the additional costs incurred by an interstate business in order to comply with standards that are unnecessarily more stringent than those of the other states within whose territory commerce is also affected. (See, e.g., *Kassel v. Consolidated Freightways Corp.*, *supra*; *Raymond Motor Transportation v. Rice*, *supra*; *Bibb v. Navajo Freight Lines*, *supra*; *Southern Pacific Co. v. Arizona*, *supra*.) Even in the absence of any protectionist or discriminatory intent, a state law whose practical effect is to regulate the conduct of commerce wholly outside its borders violates the Commerce Clause. (*Shafer v. Farmers Grain Co.*, 268 US 189, 199; see also, *Baldwin v. G.A.F. Seelig*, *supra*, at p. 522; *New York, Lake Erie and Western Railroad v. Pennsylvania*, 153 US 628, 646.)

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Where the burden of interstate commerce may fairly be denominated as purely "incidental", the state regulation may not run afoul of the Federal Constitution. (*Hughes v. Oklahoma*, 441 US 322, 331; *Pike v. Bruce Church*, 397 US 137, 142.) But where the necessary operation of the state law interferes with prices for use in other states, that is impermissible. (*United States Brewers Assn. v. Healy*, *supra*, at pp. 279, 283; *Baldwin v. G.A.F. Seelig*, *supra*, at pp. 521, 528; see also, *Edgar v. Mite Corp.*, 457 US 624.)

Moreover, such an impediment to interstate commerce is not saved with respect to alcoholic beverages by the Twenty-First Amendment to the Federal Constitution.⁵ While that amendment "bestowed upon the states broad regulatory power over the liquor traffic within their territories" (*United States v. Frankfort Distilleries*, 324 US 293, 299; see also, *Hostetter v. Idlewild Liquor Corp.*, 377 US 324, 330), it has clearly not operated to repeal the commerce clause in every case involving traffic in intoxicants (*Bacchus Imports Ltd. v. Dias*, 104 S Ct 3049, 3057-3059; *Joseph E. Seagram & Sons v. Hostetter*, *supra*, at p. 42; *Hostetter v. Idlewild Liquor Corp.*, *supra*; *Collins v. Yosemite Park & Curry Co.*, 304 US 518; cf. *California Retail Liquor Dealers Assn. v. Medical Aluminum Inc.*, 445 US 97, 106-110). The states are free from the restriction of the Commerce Clause only when regulating "the importation of intoxicants destined for use distribution or consumption within its borders" (*Hostetter v. Idlewild*

5. Section 2 of the Twenty-First Amendment provides:

"The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

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Liquor Corp., *supra*, at p. 330 [emphasis added]; see also, *Joseph E. Seagram & Sons v. Hostetter*, *supra*, at p. 42). Such license does not extend to the interference with or burdening of the promotion, sale and purchase of liquor products outside a state's own territory. Traditional Commerce Clause principles still govern a state's activities having that effect. (*Bacchus Imports Ltd. v. Dias*, *supra*; *United States Brewers Assn. v. Healy*, *supra*; *Collins v. Yosemite Park & Curry Co.*, *supra*.)

Here, it cannot be said that the combined requirements of New York's affirmation statute as construed by respondent would only affect the traffic of intoxicants in this state or create mere "repercussions beyond state lines" (*Osborn v. Ozlin*, 310 US 53, 62) which would do no violence to the Commerce Clause. Rather, the obvious and unavoidable consequence would be a drastic emburdening of petitioner's business practices in other states. Under respondent's determination, it would be virtually impossible, if not absolutely so, for petitioner to satisfy the lowest-price requirements of other affirmation states while complying with those here. Ultimately, unless every other affirmation state acquiesced in this state's computation of lowest prices, petitioner would, in effect, be forced to terminate its promotional programs in other states, thereby resulting in the exportation of this state's bar against promotional allowances. Such an interference with the conduct of petitioner's business beyond this state's borders constitutes an excessive burden on interstate commerce prohibited by the Federal Constitution and, consequently, the respondent's determination should be annulled.

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Despite my belief that respondent's determination is violative of the Federal Commerce Clause, however, I would not strike the entire affirmation statutory scheme upon which that determination was predicated. Rather, it is my view that this court should supplant the construction given the statute by respondent with one that avoids the constitutional infirmity it otherwise would suffer. "The cardinal principle of statutory construction is to save and not destroy * * * [A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same." (*Nat'l Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 US 1, 30; see also, *New York v. Ferber*, 458 US 747, 768; *Blodgett v. Holden*, 275 US 142, 148; *Panama R.R. Co. v. Johnson*, 264 US 375, 390; *United States v. Jim Fucy Moy*, 241 US 394, 401; *United States v. Delaware & Hudson Co.*, 213 US 366, 408; *McCullough v. Virginia*, 172 US 102, 112.) Indeed, this court has not hesitated to so construe a statute when deemed necessary to save it from constitutional challenge and, thereby, to give an interpretation in harmony with the fundamental laws of both the nation and this state. (See *People v. Liberta*, 64 NY2d 152, 170-171; *People v. Epton*, 19 NY2d 496, 505; *People v. Finkelstein*, 9 NY2d 342, 345; *Dollar Co. v. Canadian C. & F. Co.*, 220 NY 270, 275-278; *People ex rel. Simpson v. Wells*, 181 NY 252, 257.)

Moreover, this court has on occasion replaced its own earlier construction of a statute with another deemed more in accord with sound constitutional principles. (See,

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e.g., *People v. Epton*, *supra*, at p. 505; *Dollar Co. v. Canadian C. & F. Co.*, *supra*, at pp. 276-278.) *A fortiori* this court should replace an administrative interpretation of a statute in order to avoid serious constitutional deficiencies.

Concededly, the interpretation rendered by respondent was reasonable. It finds support in the literal meaning of the statutory language. Nevertheless, the statute is susceptible to another construction which avoids, what I believe to be, the impermissible burden upon interstate commerce otherwise imposed. It seems to me, therefore, that this court should adopt a construction that is more clearly in harmony with the Federal Commerce Clause—not only to remedy what seems to me the unconstitutionality of the administrative determination and the statute as thereby construed, but also to avoid the unquestionable doubts about the same. (*Panama R.R. Co. v. Johnson*, *supra*, at p. 390; see also, *Nat'l Labor Board Relations Board v. Jones & Laughlin*, *supra*, at p. 30; *United States v. Jim Fuey Moy*, *supra*, at p. 401.) In my view, the provisions of the affirmation statute should be construed, with due regard to the essential legislative intent, in a manner which insures their constitutionality by minimizing the interference with petitioner's and other distillers' lawful interstate business activities.

A review of the specific statutory mandates in question reveals the particular source of the constitutional problem to be remedied by an appropriate construction. The statutory provision particularly requiring affirmation (Alcoholic Beverage Control Law § 101-b[3][d]) promotes the legislative purpose of securing liquor prices to domestic wholesalers and retailers which are as low as prices of-

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fered elsewhere in the country, creates no impediment to interstate commerce in liquor products and, as such, does not on its face suffer any constitutional infirmity. (*Joseph E. Seagram & Sons v. Hostetter*, *supra*, at p. 43; contrast *United States Brewers Assn. v. Healy*, *supra*.⁶) The specific provision prohibiting rebates, allowances and other inducements to *domestic* wholesalers and retailers (§ 101-b[2][b]) furthers the legitimate interest in avoiding, within this state, fictitious list prices and "special deals" to favored purchasers (see L. 1942, ch 899, Governor's Bill Jacket at pp. 124, 136) and, likewise, effectuates no unconstitutional interference with commerce outside this state.

The conclusion is different, however, for the provision which requires that the affirmed lowest prices in New York reflect all rebates, allowances and other inducements offered or given to wholesalers in other states. (§ 101-b[3][g].) In effect, this provision, as strictly construed, defines "lowest price" in this state as the lowest price elsewhere minus the value of any such allowances—even if those allowances were offered in New York as well but

6. I agree with the majority that the holding in *Healy* is not dispositive of this case and does not mandate the invalidation of this state's affirmation statutory scheme in its entirety. The Supreme Court's affirmance in *Healy* was without opinion and, therefore, its reasons for upholding the appeals court's decision that Connecticut's affirmation requirements were unconstitutional cannot be determined. Moreover, the statute in *Healy* was found specifically to be protectionist and discriminatory in purpose—especially evident in that statute's application only to neighboring states. Nevertheless, the general principles of the Federal Commerce Clause and the Twenty-First Amendment were thoughtfully and correctly outlined in *Healy*, and their application to this case cannot be denied and indeed, in my view, mandate the conclusion that the determination here in question is unconstitutional.

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refused to respondent under the statutory prohibition. It is this definitional mandate, thus interpreted, which triggers the vicious cycle of reductions on affirmed lowest prices both outside as well as inside this state. It is this computation which runs afoul of the Commerce Clause. It necessarily places suppliers, such as petitioner, in the position of being unable to satisfy the lowest price requirements of the other states unless they cease providing any rebates, allowances or other inducements in all the other affirmation states which do permit them, or unless every one of those states decides to acquiesce in New York's lower affirmed prices.

The legislative purpose of insuring for New York purchasers equality in real prices, rather than in fictional list prices which might effectively be reduced by discounts and other inducements offered to wholesalers elsewhere, is a legitimate and valid one. But, as the statutory provision was construed by respondent, the inevitable interference with interstate commerce is too drastic a measure. Plainly, the interest involved can be adequately promoted with a lesser impact on activities in other states. (Cf. *Atlantic & Pacific Tea Co. v. Cottrell*, *supra*, at pp. 376-377; *Pike v. Bruce Church*, *supra*, at p. 142.)

To avoid the constitutional infirmity addressed above and, concurrently, serve the legislative purpose to the extent possible within that limitation, Alcoholic Beverage Control Law section 101-b(3)(g) should be construed to require that the "lowest price" be computed by making appropriate reductions to reflect all additional discounts, rebates, allowances, and any other inducements offered or

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given elsewhere, *except those which are similarly offered to wholesalers in this state but not permitted by the State Liquor Authority as violative of section 101-b(2)(b)*, as well as those, of course, which are lawfully given to wholesalers here. Hence, suppliers should be required to offer in New York both the lowest prices and the allowances or other inducements provided elsewhere. If the Legislature and, concomitantly, respondent disallow the granting of such allowances or inducements to New York wholesalers, suppliers must, of course, abide by the disallowance but should be required still to provide those same lowest prices. Suppliers should not be forced to lower those prices further in this state—below that which is charged in other affirmation states—thereby creating unavoidable difficulties for their businesses in those states when, like petitioner here, the suppliers are willing to provide the very same benefits to wholesalers in this state as elsewhere, but do not do so only because precluded by New York law.

Such a construction of the statutory provision preserves the essential elements of the affirmation statutory scheme and would not appear substantially to weaken its lawful effect. The predominate legislative purpose of insuring the *de facto* lowest prices for New York purchasers and avoiding "fictional list prices" actually reduced by "special deals" would seem still to be served by requiring that all discounts, rebates, allowances and other inducements provided elsewhere—which would otherwise have reduced the lowest prices to be affirmed in this state—must be offered in New York as well, by submission to

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the State Liquor Authority for approval or disapproval pursuant to section 101-b(2)(b) of the Alcoholic Beverage Control Law.

Accordingly, I would vacate respondent's determination and adopt the foregoing statutory construction.

* * *

Judgment affirmed, with costs. Opinion by Judge Kaye in which Chief Judge Wachtler and Judges Meyer and Simons concur. Judge Jasen dissents and votes to reverse in an opinion. Judge Alexander took no part.

Decided April 2, 1985

Order of Affirmance and Remittitur**COURT OF APPEALS**

STATE OF NEW YORK

The Hon. Sol Wachtler, Chief Judge, Presiding

—————

In the Matter of
BROWN-FORMAN DISTILLERS CORPORATION,
Appellant,
v.
STATE LIQUOR AUTHORITY,
Respondent.

—————

The appellant in the above entitled appeal appeared by White & Case, Esqs. and Schreiber & MacKnight, Esqs.; the respondent appeared by Hon. Robert Abrams, Attorney General.

The Court, after due deliberation, orders and adjudges that the judgment is affirmed, with costs. Opinion by Judge Kaye in which Chief Judge Wachtler and Judges Meyer and Simons concur. Judge Jasen dissents and votes to reverse in an opinion. Judge Alexander took no part.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be re-

Order of Affirmance and Remittitur

mitted to the Supreme Court, New York County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ DONALD M. SHERAW,

DONALD M. SHERAW,
Clerk of the Court

FILED

April 9, 1985

Illegible

Court of Appeals, Clerk's Office, Albany, April 2, 1985.

Appellate Division Majority Opinion

ASCH, J.

Petitioner Brown-Forman Distillers Corporation produces and imports distilled spirits and sells them to independent wholesalers in more than 30 States including New York. On May 22, 1981, the State Liquor Authority (Authority) served Brown-Forman with a statement of charges alleging that it had violated section 101-b (subd 3, par [d]) of the Alcoholic Beverage Control Law by selling distilled spirits to wholesalers in New York at prices higher than the prices charged wholesalers in other States. Brown-Forman had filed affirmations stating that its prices were no higher in New York than elsewhere in the United States. The charges alleged that Brown-Forman had made payments to wholesale purchasers in other States which effectively caused the price of petitioner's products to New York wholesalers to be higher than in those other States.

In the determination and findings adopted by the Authority on February 5, 1982, it was concluded that petitioner violated the New York affirmation law, section 101-b (subd 3, par [d]) of the Alcoholic Beverage Control Law, by making payments to wholesale purchasers in other States. The penalty imposed by the respondent Authority was a 10-day license suspension and a forfeiture of bond in the amount of \$20,000 on each of petitioner's two licenses. The license suspension was deferred subject to imposition within a year should the Authority determine that petitioner failed to take "practical precautions to assure . . . proper conduct".

Petitioner then commenced this CPLR article 78 proceeding in Supreme Court, New York County, which was

Majority Opinion

transferred to this court for initial determination pursuant to CPLR 7804 (subd [g]). It asserts that respondent Authority's determination is unsupported by any evidence and that hence, it contravenes the substantial evidence requirements of CPLR 7803 (subd 4). In addition, the petitioner claims that the New York affirmation statute, as thus applied, burdens interstate commerce, in violation of the United States Constitution. These contentions are without merit.

The Moreland Commission appointed by the Governor in 1963 to study the sale and distribution of alcoholic beverages in New York found that New York consumers were victims of gross price discrimination on the part of the liquor industry (Moreland Commission Report No. 3, pp 3-7). As a result, the Governor proposed legislation to end the liquor industry's discrimination against its New York customers. The Legislature enacted chapter 531 of the Laws of 1964, which sought to reduce consumer prices in New York. Section 9 of that statute, the affirmation provision, provided that in addition to filing a schedule of its prices to wholesalers, the distiller must file an affirmation that the scheduled price of each of its products is no higher than the lowest price at which the product was sold anywhere during the month immediately preceding the month in which the schedule was filed.

Thus, to engage in business in New York, a distiller or wholesaler has to affirm that the price of each of its products is as low as the lowest price in the country during the preceding month. The affirmation provision was challenged on the grounds, *inter alia*, that it constituted an exercise of power not authorized by the Twenty-First

Majority Opinion

Amendment and violated the commerce clause. However, the statute was adjudged "to be, in all respects, constitutional and valid" (*Seagram & Sons v Hostetter*, 45 Misc 2d 956, 958, affd 23 AD2d 933, affd 16 NY2d 47, affd 384 US 35, reh den 384 US 967).

Although the constitutionality of the affirmation provisions of section 101-b of the Alcoholic Beverage Control Law was upheld in *Seagram*, implementation of the law as originally enacted involved a number of problems. Consequently, in 1967 the Legislature amended the affirmation law to require distillers to affirm their New York prices to be no higher than their *current* prices elsewhere (Alcoholic Beverage Control Law, § 101-b, subd 3, par [d]). The present affirmation law provides that in addition to filing a schedule setting forth a description of each product and its price, the distiller must affirm that "the bottle and case price of liquor to wholesalers set forth in such schedule is no higher than the lowest price at which such item of liquor will be sold by such brand owner * * * to any wholesaler anywhere in any other state of the United States or in the District of Columbia * * * at any time during the calendar month for which such schedule shall be in effect" (Alcoholic Beverage Control Law, § 101-b, subd 3, par [d]).

To avoid the loophole of a distiller affirming that a given product was to be sold nationwide at a set price and then providing substantial discounts in the form of cash credit or free goods to purchasers in another State (which would result in the New York price being higher than the lowest real price elsewhere notwithstanding technical compliance with the affirmation law), the Legislature provided that in determining the lowest price elsewhere, "appropriate re-

Majority Opinion

ductions shall be made to reflect all discounts¹¹ in excess of those listed on the New York schedule and shall reflect "all rebates, free goods, allowances and other inducements of any kind whatsoever offered or given to any" purchasing wholesaler in the Nation (Alcoholic Beverage Control Law, § 101-b, subd 3, par [g]).

Accordingly, the affirmation law mandates equality not in the nominal list prices but in the real prices to the wholesalers. The distillers remain free to grant discounts, rebates, allowances, free goods, or other inducements to purchasers outside New York, *so long as these payments are taken into account by the distiller in setting its New York affirmation price.* As was true under the prior affirmation law, distillers are free to set their prices at any level so long as the New York price is no higher than the lowest real price elsewhere.

The determination by the hearing officer is supported by substantial evidence in the record. Under petitioner's program certain selected wholesalers in the various States have been provided a "lump sum" allowance, payable quarterly. This allowance, which is determined on an annual basis before the beginning of petitioner's fiscal year, is based initially upon budget requests from its various "state managers." Each State manager recommends a total dollar figure for that State on a per case basis. Petitioner asserts that its program involves a "no strings" allowance in that the wholesaler is not required to reduce his prices. It conceded, however, it employs independent market research firms to determine what promotional activities are employed by the recipients of the allowance. Petitioner also admitted that, while an allowance is effective without

Majority Opinion

change for one fiscal year, the findings of the market researchers and petitioner's own determination as to how the allowance has been used are considered in deciding whether to discontinue or reduce the following year's allowance to a given wholesaler. In addition, while petitioner argues that its program should not be considered a price rebate or discount because the wholesalers are not informed of the per brand, per case breakdown of his lump-sum allowance, it is uncontroverted that the lump sum is calculated by assigning each unit of each of petitioner's products in a given market area a dollar figure. Petitioner projects each wholesaler's annual volume of sales of each product. The allowance is finally determined by multiplying the dollar figure by the wholesaler's projected sales. The aggregate allowance is determined by adding the sum arrived at for each of the petitioner's products that is stocked by the wholesaler.

Thus, petitioner's program, which is not reflected in its price schedules filed with the State Liquor Authority, effectively *reduces* the actual liquor prices it charges in other States below the prices that it charges New York wholesalers. Petitioner is aware of or can determine the discount offered each wholesaler on a per item basis. Petitioner can also determine which is the largest discount offered for a particular item and is also in a position to use that discounted price to comply with the affirmation requirements of subdivision 3 of section 101-b of the Alcoholic Beverage Control Law. Thus, there was more than a rational basis upon which the hearing officer could determine that petitioner's allowance program constituted the "rebates, free goods, allowances and other inducements of

Majority Opinion

any kind whatsoever" proscribed by subdivision 3 of section 101-b of the Alcoholic Beverage Control Law. Petitioner failed in filing its New York affirmation under the terms of section 101-b (subd 3, par [g]) to take into account the allowance granted under its allowance program. In so doing, it was properly found to be in violation of subdivision 3 of section 101-b.

The sole constitutional issue before this court is whether the affirmation provision of subdivision 3 of section 101-b of the Alcoholic Beverage Control Law in its application to the petitioner's allowance program imposes an unreasonable burden on interstate commerce, in violation of the commerce clause of the United States Constitution. There is a strong presumption of statutory constitutionality (*Montgomery v Daniels*, 38 NY2d 41). Moreover, when competing State and Federal interests are balanced, the Twenty-First Amendment to the United States Constitution creates an "added presumption in favor of * * * state [legislation]" (*New York State Liq. Auth. v Bellanca*, 452 US 714, 718). Until every reasonable mode of reconciliation of the statute with the Constitution has been resorted to and found impossible, the statute will be upheld (see *Hotel Dorset Co. v Trust for Cultural Resources*, 46 NY2d 358, 370).

The petitioner and the dissent assert that the practical effect of section 101-b (subds 2, 3, par [d]) of the Alcoholic Beverage Control Law, as applied, impermissibly seeks to control petitioner's prices in other states. The dissent cites *United States Brewers Assn. v Healy* (692 F2d 275, aff'd with no opn — US —, 104 S Ct 265), in support of this conclusion. However, the United States Supreme Court in

Majority Opinion

reviewing New York's earlier affirmation statute has stated: "As part of its regulatory scheme for the sale of liquor, New York may constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country." (*Seagram & Sons v Hostetter*, 384 US 35, 43, *supra*.) The application of subdivision 3 of section 101-b of the Alcoholic Beverage Control Law to petitioner's allowance program does not conflict with the holding in *Healy*. There, the court specifically found that "the effect" of Connecticut's affirmation law "is to control" minimum prices to wholesalers outside the State (*United States Brewers Assn. v Healy*, *supra*, p 282). Here, New York's affirmation statute has no impact on petitioner's allowance program and does not dictate out-of-State discounts. Finally, perhaps more significantly, the court in *Healy* explicitly found that the Connecticut law sought to regulate prices in *adjoining* States. "Historically, the retail price of beer has been generally higher in Connecticut than in its neighboring states, i.e., Massachusetts, New York, and Rhode Island. As a consequence, Connecticut residents have crossed state borders in significant numbers to purchase beer in other states at lower retail prices. In 1981, the Connecticut legislature * * * [enacted] the beer price affirmation provisions challenged here. The district court found it undisputed that the purpose of these provisions was to lower the retail price of beer in Connecticut, thereby increasing the purchase of beer by Connecticut residents within the state and generating increased tax revenues for the state." (*United States Brewers Assn. v Healy*, *supra*, p 276.)

Majority Opinion

Unlike the facts in *Healy (supra)*, however, no discriminatory intent underlies New York's affirmation law. On the contrary, the declared and actual purpose of the law is to *prevent* discrimination (Alcoholic Beverage Control Law, § 101-b, subd 1). Unlike the Connecticut law which was stricken, New York's affirmation law is not directed at restricting prices charged in neighboring States in order to "increase" liquor purchases in New York and to "generate increased tax revenues." The New York law makes no discriminatory distinction between adjoining States and distant States and cannot possibly be considered as an effort to reduce liquor sales in faraway States and thereby "generate increased revenues" here in New York.

Accordingly, the determination by respondent of February 3, 1982, finding that petitioner violated the New York affirmation law, section 101-b (subd 3, par [d]) of the Alcoholic Beverage Control Law, by making payments to wholesale purchasers in other States and thereby causing the wholesale prices of its products in New York State to be higher than petitioner's prices elsewhere in the Nation, and imposing a penalty of 10-day license suspension and a forfeiture of bond in the amount of \$20,000 on each of petitioner's two licenses, deferring the license suspension subject to imposition within a year should the respondent Authority determine that petitioner failed to take practical precautions to assure proper conduct, should be confirmed, without costs, and the petition dismissed.

Appellate Division Dissenting Opinion

KUPPERMAN, J. (dissenting). I would annul the determination of the State Liquor Authority (Authority) on the ground that the New York affirmation statute (Alcoholic Beverage Control Law, § 101-b)*, as applied by the Authority, imposes an impermissible burden on interstate commerce in violation of the commerce clause of the Federal Constitution (US Const, art I, § 8, cl 3).

Brown-Forman Distillers Corp., the petitioner in this transferred CPLR article 78 proceeding, supplies numerous brands of wine and liquor to wholesalers in approximately 30 States, including New York. Of those States, approximately 20 have affirmation statutes modeled after that in effect in New York.

The issue presented is whether it is constitutional for the respondent Authority to penalize petitioner for allegedly falsely affirming that its prices to wholesalers for individual brands were as low in New York as in any other State, on the ground that a lump-sum promotional allowance given by petitioner to its wholesalers in other States, but prohibited by law in New York, effectively lowered the wholesale prices in other States below the prices affirmed in New York.

In 1977, the Federal Bureau of Alcohol, Tobacco and Firearms (BATF) ruled that the Federal Alcohol Adminis-

* Section 101-b (subd 3, par [d]) provides in pertinent part: "There shall be filed * * * an affirmation duly verified by the owner of such brand of liquor, or by the wholesaler designated as agent * * * that the bottle and case price of liquor to wholesalers set forth in such schedule is no higher than the lowest price at which such item of liquor will be sold by such brand owner or such wholesaler designated as agent, or any related person, to any wholesaler anywhere in any other state of the United States * * * during the calendar month for which such schedule shall be in effect".

Dissenting Opinion

tration Act does not prohibit the granting of lump-sum promotional allowances. (See BATF Bulletin 77-17.) In May, 1978, the BATF conditionally approved petitioner's request to conduct the program of promotional allowances which is the subject of this litigation. Among the conditions for approval are the following: (i) the allowances are to be with "no strings", to be spent as the wholesalers see fit; (ii) the amounts of the allowances are not to be dependent upon the wholesalers' volume of sales of any particular brand; and (iii) the program may be terminated at any time by petitioner.

Petitioner then sought permission from respondent to conduct the program in New York, but respondent refused to approve the program on the ground that subdivision 2 of section 101-b of the Alcoholic Beverage Control Law prescribes the furnishing of such allowances. That section provides in pertinent part: "It shall be unlawful for any person who sells liquors or wines to wholesalers or retailers * * * (b) to grant, directly or indirectly, any discount, rebate, free goods, allowance or other inducement of any kind whatsoever".

Petitioner holds liquor licenses for two premises used for distribution in New York. After a hearing with respect to each license, the hearing officer held that petitioner had falsely affirmed that its New York wholesale prices were as low as those in Massachusetts, where, the hearing officer held that petitioner's wholesale prices were effectively lowered by the promotional allowance approved as aforesaid by BATF. The respondent Authority adopted the determination of the hearing officer.

Dissenting Opinion

The immediate effect of the Authority's determination, if confirmed, would be to require petitioner either to lower its wholesale prices in New York to reflect the amount of the promotional allowances granted in other States, despite the fact that the allowances are not allocated by brand or unit but given in a lump sum, or to discontinue its Federally approved promotional program of granting allowances in other States. Should petitioner choose to lower its New York prices to comply, then, under the affirmation statutes in other States, petitioner would have to offer the same newly lowered prices as those offered in New York. Thus, the practical effect of section 101-b (subds 2, 3, par [d]) of the Alcoholic Beverage Control Law, as applied, is impermissibly to control petitioner's prices in other States. (See *United States Brewers Assn. v Healy*, 692 F2d 275, 279-282, affd — US —, 52 USLW 3308.)

Under the circumstances of this case, the mode of liquor regulation chosen by New York constitutes such an interference with petitioner's operation elsewhere as to offend the commerce clause. See *Seagram & Sons v Hostetter*, 384 US 35, 42-43, citing *Baldwin v G.A.F. Seelig*, 294 US 511.)

CARRO, BLOOM and ALEXANDER, JJ., concur with ASCH, J.; KUPFERMAN, J.P., dissents in an opinion.

Determination of respondent dated February 5, 1982, confirmed, the petition dismissed, without costs and without disbursements.

Determination of State Liquor Authority

New York LL 585
Brown-Forman Distillers Corp.
555 Madison Avenue
New York, New York 10022

Hearing was held on October 27, 1981 before Hearing Officer Andrew Lee Aubry on the following charge:

"That the licensee filed affirmations in connection with schedules filed with the Authority, since on or about May 1979, in which it stated that the price of brands of liquor to wholesalers as set forth in the schedule would be no higher than the lowest price at which such brands of liquor would be sold by the licensee to wholesalers in any other state of the United States, whereas in truth and in fact, the licensee during the same period of time provided allowances and/or inducements to wholesalers in other states which effectively caused the price of those brands of liquor to wholesalers in those other states to be lower than the price to wholesalers in New York State; all in violation of Section 101-b subdivision 3(d) of the Alcoholic Beverage Control Law."

The Authority was represented by Michael J. Greenfeld, Esq. The licensee was represented by White & Case, Esqs., 14 Wall Street, New York, N.Y. by Macdonald Flinn, Esq. of counsel and Schreiber Tunick & MacKnight, Esqs., 375 Park Avenue, New York, N.Y. by William B. Schreiber, Esq. of counsel.

Authority's Exhibit 1 consisting of a two part stipulation entered into by the Authority and counsel for the licensee and the exhibits attached thereto is in evidence as Authority's Exhibit 1.

Determination of State Liquor Authority

FINDINGS AND CONCLUSIONS:

I credit Part A of the undisputed stipulation and I find that Brown-Forman is a corporation duly organized and existing under the laws of the State of Delaware which is qualified to transact business in New York State. I further find that Brown-Forman has offices at 1 North Broadway, White Plains, New York and 555 Madison Avenue, New York, New York.

I find that Brown-Forman is engaged in the business of manufacturing distilled spirits and importing wines and spirits, which it sells in inter-state commerce to wholesalers in more than 30 States, including New York.

I further find that Brown-Forman engages in the sale of wines and spirits in the State of Massachusetts which is an affirmation state.

I further find that on or about May 26, 1978 the Bureau of Alcohol, Tax and Firearms ("BATF") approved in writing a request by Brown-Forman for permission to conduct marketing and promotional programs with each of the wholesalers throughout various states of the United States.

I further find that the program involved the payment of monies in the form of promotional allowances by Brown-Forman to its wholesalers in both affirmation and non-affirmation status throughout the United States. These promotional allowances to be paid to each wholesaler are determined in annual lump sum amounts payable quarterly in the form of credit memoranda issued by Brown-Forman to its wholesalers in each State or sales area as the case may be.

Determination of State Liquor Authority

I also find that following the receipt of BATF approval Brown-Forman obtained approval from the Massachusetts Alcoholic Beverage Control Commission, to conduct the program in Massachusetts, and in fact did so beginning with the fiscal year 1980 and continuing to the present time.

I further find that the New York State Liquor Authority was requested to permit Brown-Forman to conduct the program in New York but was refused on the grounds that Section 101-b, subdivisions 2(a), (d) and (g) of the Alcoholic Beverage Control Law prohibits any allowances or inducements except quantity discounts and a discount with payment within a prescribed time.

I further find that the licensee filed affirmations in New York State in connection with the schedules filed with the Authority, since on or about May 1979, in which it stated that the price of brands of liquor to wholesalers as set forth in the schedule with the higher than the lowest price at which brands of liquor would be sold to wholesalers in any other state of the United States.

I find that the licensee in providing the allowances and/or inducements to the wholesalers in other states effectively caused the price of those brands of liquor to wholesalers in these other states to be lower than the price to wholesalers in New York State.

I further find it significant the method of promotion utilized by the licensee, consisting of a monetary allowance, was utilized in part by the wholesalers to provide "Post Downs". I further find that the promotional allowance amounted to a discount by the licensee to the

Determination of State Liquor Authority

wholesaler thereby decreasing the price by Brown-Forman to wholesalers in Massachusetts.

The promotional funds used by wholesalers as "Post Downs" effectively lowered the price to wholesalers in Massachusetts below the affirmation price in New York. It is immaterial that the promotional funds were not designated for any particular brand name of the licensee.

I further find that the licensee method of the promotion was in effect a method designed to circumvent the New York State Alcoholic Beverage Control Law and did violate Section 101-b, subdivision 3(a)(d)(g) of the Alcoholic Beverage Control Law.

Accordingly the charge is sustained.

The licensee contends that Section 101-b of the Alcoholic Beverage Control Law violates the Commerce Clause of the United States Constitution. I have by no authority to make a determination as to the constitutionality of Section 101-b of the Alcoholic Beverage Control Law.

/s/ ANDREW LEE AUBRY 10/16/81

ANDREW LEE AUBRY
Hearing Officer

ALA:sa

Statutory Provisions

The following subdivisions of §101-b of the New York Alcoholic Beverage Control Law, in pertinent part, provide:

2. It shall be unlawful for any person who sells liquors or wines to wholesalers or retailers

(a) to discriminate, directly or indirectly, in price, in discounts for time of payment or in discounts on quantity of merchandise sold, between one wholesaler and another wholesaler, or between one retailer and another retailer purchasing liquor or wine bearing the same brand or trade name and of like age and quality; (b) to grant, directly or indirectly, any discount, rebate, free goods, allowance or other inducement of any kind whatsoever, except a discount not in excess of two per centum for quantity of liquor, a discount not in excess of five per centum for quantity of wine and a discount not in excess of one per centum for payment on or before ten days from date of shipment.

3. (a) No brand of liquor or wine shall be sold to or purchased by a wholesaler, irrespective of the place of sale or delivery, unless a schedule, as provided by this section, is filed with the liquor authority, and is then in effect. Such schedule shall be in writing duly verified, and filed in the number of copies and form as required by the authority, and shall contain, with respect to each item, the exact brand or trade name, capacity of package, nature of contents, age and proof where stated on the label, the number of bottles contained in each case, the bottle and case price to wholesalers, the net bottle and case price paid by the seller, which prices, in each instance, shall be individual for each item and not in "combination" with any other item, the discounts for quantity, if any, and the discounts for time of payment, if any. Such brand of

Statutory Provisions

liquor or wine shall not be sold to wholesalers except at the price and discounts then in effect unless prior written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter

* * *

(d) There shall be filed in connection with and when filed shall be deemed part of the schedule filed for a brand of liquor pursuant to paragraph (a) of this subdivision an affirmation duly verified by the owner of such brand of liquor, or by the wholesaler designated as agent for the purpose of filing such schedule if the owner of the brand of liquor is not licensed by the authority, that the bottle and case price of liquor to wholesalers set forth in such schedule is no higher than the lowest price at which such item of liquor will be sold by such brand owner or such wholesaler designated as agent, or any related person, to any wholesaler anywhere in any other state of the United States or in the District of Columbia, or to any state (or state agency) which owns and operates retail liquor stores (i) at any time during the calendar month for which such schedule shall be in effect, and (ii) if a like affirmation has been filed at least once but was not filed during the calendar month immediately preceding the month in which such schedule is filed, then also at any time during the calendar months not exceeding six immediately preceding the month in which such schedule shall be in effect and succeeding the last calendar month during which a like affirmation was in effect. . . .

* * *

(g) In determining the lowest price for which any item of liquor was sold in any other state or in the District of Columbia, or to any state (or state agency)

Statutory Provisions

which owns and operates retail liquor stores, appropriate reductions shall be made to reflect all discounts in excess of those to be in effect under such schedule, and all rebates, free goods, allowances and other inducements of any kind whatsoever offered or given to any such wholesaler or state (or state agency) as the case may be, purchasing such item in such other state or in the District of Columbia; provided that nothing contained in paragraphs (d) and (e) of this subdivision shall prevent differentials in price which make only due allowance for differences in state taxes and fees, and in the actual cost of delivery. . . .

* * *

4. Each such schedule required by paragraph (a) of subdivision three of this section shall be filed on or before the twenty-fifth day of each month and the prices and discounts set forth therein shall become effective on the first day of the second succeeding calendar month and shall be in effect for such second succeeding calendar month. Each such schedule required by paragraph (b) of subdivision three of this section shall be filed on or before the fifth day of each month, and the prices and discounts set forth therein shall become effective on the first day of the calendar month following the filing thereof, and shall be in effect for such calendar month. . . .

**Notice of Appeal to the Supreme Court
of the United States**

COURT OF APPEALS

STATE OF NEW YORK

In the Matter of

BROWN-FORMAN DISTILLERS CORPORATION,

Appellant,

against

STATE LIQUOR AUTHORITY,

Respondent.

Notice is hereby given that Brown-Forman Distillers Corporation, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York affirming the judgment of the Appellate Division, First Department, Supreme Court of the State of New York (New York County Clerk's Index Number 12880/1982) dismissing the petition, entered in this Article 78 proceeding on April 2, 1985.

Notice of Appeal to the Supreme Court of the United States

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: New York, New York
June 20, 1985

Yours etc.,

WHITE & CASE
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Brown-Forman Distillers
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HON. DONALD M. SHERAW
Clerk of the Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207

The Clerk of New York County
60 Centre Street
New York, New York 10007

Affirmation of Service

COURT OF APPEALS

STATE OF NEW YORK

In the Matter of

BROWN-FORMAN DISTILLERS CORPORATION,

Appellant,

against

STATE LIQUOR AUTHORITY,

Respondent.

WILLIAM L. BELLOTTI, an attorney duly admitted to practice law before the Courts of this state hereby affirms under the penalties of perjury as follows:

On June 20, 1985 I served a copy of the within Notice of Appeal to the United States Supreme Court, upon the office of the Solicitor General of the State of New York, c/o The Capitol, Albany, New York 12224 by placing said Notice of Appeal in a securely wrapped postage pre-paid envelope addressed to the said office at the aforesaid address, and thereafter by first class mail, mailed it in the envelope containing the said Notice of Appeal.

/s/ WILLIAM L. BELLOTTI

WILLIAM L. BELLOTTI

DATED: New York, New York
June 20, 1985

MOTION

No. 84-2030

Supreme Court, U.S.

FILED

AUG 30 1985

JOSEPH P. SPANGL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BROWN-FORMAN DISTILLERS CORPORATION,

Appellant,

— against —

STATE OF NEW YORK LIQUOR AUTHORITY,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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Counsel of Record

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BEST AVAILABLE COPY

Question Presented

Has appellant presented a substantial federal question in alleging that the application of New York's liquor price affirmation law, under which distillers must affirm that the prices they charge their New York customers as reflected in monthly prices schedules filed with the liquor authority will be no higher than their prices in any other state during the month such schedules are effective, to appellant's Allowance Program, is not protected by the Twenty-first Amendment and is violative of the Commerce Clause of the United States Constitution?

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

BROWN-FORMAN DISTILLERS CORPORATION,
Appellant,
— against —
STATE OF NEW YORK LIQUOR AUTHORITY,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

Appellee, State of New York Liquor Authority ("SLA"), moves to dismiss or affirm on the ground that this appeal fails to present a substantial federal question and the decision of the court below is so obviously correct as to warrant no further review.

Statement of the Case

Appellee, the SLA, adopts and relies on the facts and statutory analysis of the majority opinions below of the New York Court of Appeals and the Appellate Division, Second Judicial Department, of the New York State Supreme Court. (1a-21a, 37a-44a).¹

This case involves a special proceeding commenced under New York Civil Practice Law and Rules, Article 78 (McKinney's 1981),

¹ References to pages in the appendix to the Jurisdictional Statement are indicated as (___ a).

to review the administrative determination of the SLA in applying the liquor price affirmation law to appellant's Allowance Program. (37-a, 38-a). The petition specifically alleges that "[r]espondent's application of the 'affirmation' provision . . . imposes an un-reasonable burden on interstate commerce . . ." Appellant's facial attack (J.S. I)² on the statute goes beyond the pleadings of this case.

ARGUMENT

THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The Twenty-first Amendment to the United States Constitution provides the states with "wide latitude" in regulating the sale and distribution of alcoholic beverages within their respective borders. *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35 (1966), *aff'g* 16 N.Y.2d 47, 209 N.E.2d 701, 262 N.Y.S.2d 75 (N.Y. 1965), *aff'g*, 23 A.D.2d 933, 259 N.Y.S.2d 644 (3d Dep't 1965), *aff'g*, 45 M.2d 956, 258 N.Y.S.2d 442 (Sup. Ct. Alb. Co. 1965). This wide latitude "logically entails considerable regulatory power not strictly limited to importing and transporting alcohol." *California Retail Liquor Dealers v. Midcal*, 445 U.S. 97, 107 (1980). While Congress has retained the right to regulate interstate commerce in the sale and distribution of alcoholic beverages, the legitimate rights of the states under the Twenty-first Amendment and those of Congress under the Commerce Clause "must be considered in light of each other . . . in the context of the issues and interests at stake in any concrete case." *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964). Only when, instead of a legitimate state objective, "simple economic protectionism is effectuated by state legislation" does a stricter rule apply. *Bacchus Imports*,

² References to pages in the Jurisdictional Statement are indicated as (J.S. ____).

Ltd. v. Diaz, 104 S. Ct. 3049, 3055 (1984); *see also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981); *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). To support a charge of "economic protectionism", it must be established that the statute under attack has "either [a] discriminatory effect [citation omitted] . . . or [a] discriminatory effect [citation omitted] . . ." *Bacchus Imports*, 104 S. Ct. at 3055.

This Court has previously held that New York's interest in enacting a liquor price affirmation law to protect New York citizens from discriminatory liquor pricing practices is a viable, legitimate interest which does not unlawfully interfere with interstate commerce and is protected under the Twenty-first Amendment. *Joseph E. Seagram & Sons v. Hostetter*, *supra*.³ The affirmation law has been amended since *Seagram v. Hostetter*, to require the affirmation to be "prospective" rather than "retrospective". This change occurred at the suggestion of the liquor industry and was an attempt to avoid practical problems arising from the operation of the former law; it reflected no change in state policy or interest.⁴ (39a). The requirement of N.Y. Alcoholic Beverage Control Law ("ABC Law") § 101-b(3)(g) that all "rebates, free goods, allowances and other

³ The majority below noted that "[t]his history of discrimination and the legitimacy of this State objective, are not controverted by appellant". (J.S. 8).

⁴ The present affirmation law is characterized as "prospective" in nature because the affirmation of lowest price affirms that the distiller's prices contained in the monthly schedule filed with the affirmation are to be as low as the lowest in the country "during the calendar month for which such schedule shall be in effect". The affirmation and schedule, which must be filed on or before the 25th of the month, become effective on the first day of the second succeeding month. However, in a real sense, the affirmation system can also be characterized as "current" (rather than "prospective") because during the "effective" month, customers are assured that *at the moment of purchase* (rather than, say, as of the date the affirmation is filed) they are *currently* paying a price which is no higher than *current* prices elsewhere.

inducements of any kind whatsoever" be reflected in the affirmation and price schedule was part of the earlier statute upheld in *Seagram v. Hostetter* and has remained unchanged.

The courts below properly found (5a-10a) that the record is devoid of any evidence that New York's affirmation law has become constitutionally impaired by the post-*Seagram v. Hostetter* amendment. There has been no showing that the present law constitutes "economic protectionism" because of "either discriminatory purpose [citation omitted] or discriminatory effect [citation omitted] . . ." *Bacchus Imports*, 104 S. Ct. at 3055. There has been no showing that the law was enacted to "protect local industry or discriminate against out-of-state enterprises" or to advance "State revenue interests." (7a, 9a). There is nothing in the record to suggest the affirmation law, as amended, seeks to discourage or forbid the importation of goods from sister states. See, e.g., *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). Nor is there any evidence that the statute seeks to provide New York citizens with any preferred or exclusive access to the goods of a sister state. See, e.g., *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982). Indeed, the legislative history behind the statute and this Court's and the New York courts' rulings in *Seagram v. Hostetter*, affirmatively establish the purpose and effect of New York's law is to prevent — not — promote — price discrimination in the sale of alcoholic beverages.⁶

Applying the "balancing" test in favor of the validity of New York's affirmation law, the court below properly held that appellant presented no empirical evidence that the statute has a

⁶ In a recent decision in *Joseph E. Seagram & Sons v. Gazzara*, No. 83 Civ. 6825 (S.D.N.Y. May 22, 1985), appeal docketed No. 85-7547 (2d Cir. July 1, 1985) ("*Seagram*" II), the district court, relying upon *Seagram v. Hostetter*, has also unequivocally held that the present New York affirmation law under challenge here is not protectionist. The *Seagram II* decision is annexed hereto as an appendix, with references thereto indicated as (App. ____).

discriminatory or adverse impact on interstate commerce, or the degree of any such impact.⁶ This failure is fatal to appellant's position that the *application* of the statute unreasonably interferes with interstate commerce. Even if there were evidence that the statute here has an interstate impact from the advancement of a state interest already found by this Court to be properly within the Twenty-first Amendment, "[t]he mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids." *Seagram v. Hostetter*, 384 U.S. at 43, quoting *Osborn v. Ozlin*, 310 U.S. 53, 62 (1940).⁷

In addition to a lack of evidence to support appellant's speculation, is its total failure to address the implications arising from what is, in effect, a national system of liquor price regulation. Approximately thirty-eight states have some form

⁶ Only recently this Court has again emphasized federalism and the deference owed to state legislatures and judiciary, and the need to avoid federal court determinations of state interests and interference with regulatory schemes. *Southern Motor Carriers Rate Conference, Inc. v. United States*, 105 S. Ct. 1721 (1985); *Town of Hallie v. City of Eau Claire*, 105 S. Ct. 1713 (1985). This should be particularly true where the Twenty-first Amendment is involved.

⁷ It is also significant that in *Seagram II*, involving a facial challenge to ABC Law § 101-b(3)(d), the district court, upholding the statute, noted that "despite the fact that the amended New York affirmation statute has been in effect for eighteen years, plaintiff has not suggested how that statute has, in practice, proved more burdensome than the statute as originally enacted". The *Seagram II* court went on to note that the argument that New York's law prevents lower prices in other states applies as much to the old law, upheld in *Seagram v. Hostetter*, as to the new law. (App. 6). The appellant here has made no greater offer of proof than the plaintiff in *Seagram II*. Nor can appellant reasonably argue the statute prevents it from modifying its allowances under the Allowance Program in other states. The Program as approved by the BATF requires, and the Program so provides, that allowances may not be modified or withdrawn during the fiscal year, without regard to New York's affirmation law.

of statutory, regulatory or contractual requirement that liquor prices in those respective states be as low as anywhere else.⁹ Many of the "affirmation" states, as appellant concedes (J.S. 4), have statutory provisions similar to New York's which control the ability of distillers to vary their prices in the respective states. Any conclusion as to the alleged impact or practical effect of New York's law must of necessity consider the statute not in a vacuum but in light of the fact that appellant's and other distillers' pricing policies are to a great degree already restricted by a national system of liquor price restrictions. To assume, without evidence, that it is New York's law on its face which may prevent appellant from changing its liquor price in, say Massachusetts, rather than the laws of Massachusetts itself or the overall national system of liquor price restrictions, is totally unwarranted.

Appellant's argument that the affirmation law on its face prevents it from lowering its prices in other states further ignores the fact that ABC Law § 101-b(3)(a) provides that upon written permission of the SLA, for "good cause" shown, liquor may be sold in New York at a price other than the affirmed

⁹ Recently, Pennsylvania sought the original jurisdiction of this Court to file a complaint against thirty-seven states challenging the liquor price affirmation laws, regulations and practices of the defendants. Among the allegations asserted by Pennsylvania was the unconstitutional economic impact of such laws, regulations and practices. (Br. in Support of Motion for Leave to File Compl. at 62). Among the opposing arguments made by defendants was the observation that the moving papers failed to make any factual showing of such impact. (Br. in Opp. at 18). This Court denied Pennsylvania's motion, without opinion. *Pennsylvania v. Alabama, et al.*, 53 U.S.L.W. 3881 (June 4, 1985).

¹⁰ Appellant's failure in this respect is precisely what this Court observed of plaintiff's case in *Seagram v. Hostetter*, 384 U.S. at 41: "The serious discriminatory effects of [the affirmation requirement] alleged by appellants on their business outside New York are matters largely of conjecture". Appellant's speculative arguments here raise no substantial questions, for the very same reason.

lowest scheduled price. Nothing in the record shows that appellant ever applied to the SLA to reduce its New York affirmed prices for "good cause". In referring to this "good cause" provision, this Court noted in *Seagram v. Hostetter*, 384 U.S. at 46, that the SLA was provided with "ample discretion" to modify the schedule requirements." This Court went on to state, 384 U.S. at 46:

We cannot presume that the Authority [SLA] will not exercise that discretion to alleviate any friction that might result should the ABC Law chafe against the Robinson-Patman Act or any other federal statute.¹⁰

Equally unavailing is appellant's speculation that the application of New York's affirmation law to its Allowance Program will result in a "downward price spiral" necessitating abandonment of the Program because other states would also mandate price reductions to reflect the lower New York prices incorporating the rebates of the Program.¹¹ As the majority below correctly noted, (10a-12a) the record is devoid of any evidence that such "downward spiral" is a practical reality. Further, even assuming, *arguendo*, such were the case, this downward spiral would not be the direct result of New York's law but the direct application and interpretation of the affirmation requirements

¹⁰ The court in *Seagram II*, citing *Seagram v. Hostetter*, concluded that there is no compelling reason to believe that SLA's discretion in this respect will not be applied in a constitutional manner. (App. 5).

¹¹ One could just as well speculate that the alleged "spiral" effect would be a necessary consequence of a "retroactive" affirmation law upheld by this Court in *Seagram v. Hostetter*. See *Seagram II*. (App. 6). Further, under appellant's "spiral" argument New York could not constitutionally restrict discriminatory liquor pricing within its own borders while at the same time requiring that New York customers pay no higher for their liquor than customers in other states. Under appellant's theory, New York's SLA in applying New York law must be bound by the administrative determinations of other states that a particular allowance program does not constitute a rebate or inducement which must be reflected in New York's prices. Such arguments totally subvert to this Court's holding in *Seagram v. Hostetter*.

of the various states by their respective administrative agencies. Such uncertainty and speculation simply are not a sufficient basis for striking down a statutory scheme which is entitled to a strong presumption of constitutionality. See *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 718 (1981).

Appellant's reliance on *United States Brewers Association Inc. v. Healy*, 692 F.2d 275 (2d Cir. 1982), *aff'd, without opinion*, 104 S. Ct. 265 (1983), is misplaced. There, the court struck down a "prospective" Connecticut beer affirmation statute with a legislative history patently showing it to be predatory economic protectionism aimed at "discriminat[ing] against out-of-state businesses and protect-[ing] local tax interests". (9a). The *Healy* court declined to apply any "balancing of interests" test but struck down the Connecticut law under a more stringent level of scrutiny applied to protectionist legislation. Given the history of New York's legislation, the test applied in *Healy* is not applicable here.

The court in *Healy*, dealt with the beer and not the liquor industry. Beer prices are much less extensively regulated in the United States than those of liquor. Consequently, beer prices are subject to greater, more frequent fluctuation than liquor prices. (10a). The *Healy* court did not have to consider the pricing impact of other beer affirmation statutes or any national system of beer pricing restrictions, since apparently none exists. The *Healy* court was therefore correct in concluding that a beer affirmation statute, on its face, may have a significant disruptive impact on free price movement in other states. By contrast, because liquor prices are highly regulated in many states, it may be said that liquor price changes in various states are effectuated on the most limited basis and only after the distiller has determined well in advance the impact such changes will have across the country. New York's liquor affirmation law also significantly differs from the statute in *Healy* in that the Connecticut law, unlike New York's, made no provision for permitting a distiller upon "good cause" and with proper approval,

to modify his prices so as to avoid any conflict resulting from his lowering his prices in one or more other states.¹²

In sum, the appellant cannot meet the heavy burden of establishing that New York's affirmation statute, as applied to appellant's Allowance Program, unduly interferes with interstate commerce. Moreover, appellant's argument that the New York statute constitutes economic protectionism failed in this Court in *Seagram v. Hostetter* and in the courts below. This case presents no substantial federal question meriting review here.

¹² As previously noted here, this Court has already identified the "good cause" provision of New York's law as a significant element in its constitutionality. *Seagram v. Hostetter*, 384 U.S. at 46.

CONCLUSION

As the appellant has failed to raise a substantial federal question, this Court should dismiss the appeal or affirm.

Dated: New York, New York
August 29, 1985

Respectfully submitted,

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APPENDIX

United States District Court
Southern District of New York
83 CIV 6825 (LBS)

OPINION
May 22, 1985

JOSEPH E. SEAGRAM & SONS, INC., an Indiana Corporation
on behalf of its division General Wine & Spirits Company
and all other divisions,

Plaintiff,

— against —

ANTHONY V. GAZZARA, Chairman, HUGH B. MARIUS,
ROBERT DOYLE, TERRENCE FLYNN and
FREDERICK T. PANNOZO, as Commissioners, and BAR-
BARA JOANNI LORD, as Secretary of the State Liquor
Authority, Division of Alcoholic Beverage Control, State of New
York,

Defendants.

APPEARANCES:

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LEONARD B. SAND, U.S.D.J.

SAND, J.

Plaintiff, Joseph E. Seagram & Sons, Inc., challenges the constitutionality of New York's liquor price affirmation statute, N.Y. ABC Law § 101-b(3), contending that it is violative on its face of the Commerce Clause. Plaintiff seeks a judgment declaring the statute unconstitutional and enjoining the defendant officials of the State Liquor Authority (hereinafter "SLA") from enforcing it. Both sides have moved for summary judgment.¹ The New York State Wholesale Liquor Association, together with various individual liquor suppliers, have intervened on behalf of the defendants. For the reasons set forth below, we conclude that the statute does not, on its face, offend the Commerce Clause.²

Under New York's Affirmation statute, distillers who sell liquor to New York wholesalers must file a monthly schedule of the prices that will be charged for their products in New York State. N.Y. ABC Law § 101-b(3)(a). Those products may not be sold in New York except at the prices listed in the schedule "unless prior written permission of the [SLA] is granted for good cause shown and for reasons not inconsistent with the purpose" of the statute. *Id.* In addition, the schedule must be accompanied by an affirmation "that the ... price of liquor to wholesalers set forth in such schedule is no higher than the lowest price at which such items of liquor will be sold ... in any other state or in the District of Columbia ... at any time during the calendar month for which such schedule shall be in effect ..." Section 101-b(3) (d). The making of a false statement in an affirmation filed pursuant to § 101-b(3) (d) is a misdemeanor, punishable by fine or imprisonment or both. Section 101-b(3) (h). Failure or refusal to comply with any other aspect of the scheduling and affirmation requirements may result in revocation, cancellation or suspension of any license issued pursuant to that statute, and in the imposition of a fine. Section 101-b(6).

The statute, in its present form, has been in effect since 1967. An earlier version of the statute, which required the filing of

an affirmation based on the *preceding* month's prices, was upheld by the Supreme Court in *Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, *reh'g denied*, 384 U.S. 967 (1966). Until recently, it was assumed that the amendment of the statute in 1967 did not affect its constitutionality. See, e.g., *Affiliated Distillers Brands Corp. v. State Liquor Authority*, 301 N.Y.S.2d 316, 319 (1st Dept. 1969), *aff'd*, 311 N.Y.S.2d 25 (N.Y. 1970).³

Plaintiff now raises two challenges to the statute's validity under the Commerce Clause. The first is directed toward the statute as amended, and is based upon the recent decision of the Court of Appeals for this Circuit in *United States Brewers Ass'n v. Healy*, 692 F.2d 275 (2d Cir. 1982), *aff'd w/o op.*, 104 S.Ct. 265 (1983). The second challenge is, in essence, a challenge to the current validity of *Seagram v. Hostetter*, *supra*, a 1966 decision of the Supreme Court which held that liquor price affirmation statutes are a permissible exercise of the regulatory authority granted to the states by the Twenty-First Amendment. The basis for this challenge is the Supreme Court's recent decision in *Bacchus Imports, Ltd. v. Dias*, 104 S.Ct. 3049 (1984). We consider each challenge in turn.

The Statute As Amended

Plaintiff first contends that the decision in *United States Brewers Ass'n v. Healy*, *supra*, which invalidated the beer price affirmation provision of the Connecticut Liquor Control Act, requires invalidation of the current version of New York's affirmation statute.

The statute at issue in *Healy* required the filing of a monthly beer price schedule together with an affirmation that the prices listed in the schedule were no higher than the lowest prices at which beer would be sold in the three states adjoining Connecticut during that month. The schedule was not subject to amendment, nor could beer be sold except at the price listed in the schedule. 692 F.2d at 276-78.

The Second Circuit held that the Connecticut statute effectively set a minimum price for beer in a four-state area, and

that in doing so, it ran afoul of the Commerce Clause. The Court noted that "it has been held repeatedly that where the practical effect of a state's legislation is to control conduct in *other* states, the regulation violates the Commerce Clause," *id.* at 279 (citations omitted), and that while the Twenty-First Amendment gives states broad powers to regulate importation and in-state traffic in alcoholic beverages, "nothing in the Twenty-First Amendment suggests that a state may regulate the sale of liquor outside of its own territory." *Id.* at 281.

The Court in *Healy* distinguished *Seagram v. Hostetter*, *supra*, finding that the statute upheld there:

differed significantly from the Connecticut statute, because, unlike Connecticut's beer price affirmation provisions which control brewers' future conduct in the states surrounding Connecticut, the New York law in *Seagram* merely required that New York prices reflect what had been charged elsewhere in the past. Thus, the New York law, although it affected the prices that manufacturers would choose to set in other states, did not limit the freedom of a manufacturer at any given time to raise or lower prices in any other state.

Id. at 283.

Plaintiff suggest that *Healy* represents a holding that all "prospective affirmation" statutes — that is, those requiring an affirmation as to the prices that *will be* charged in other states — are invalid under the Commerce Clause. We do not read *Healy* so broadly. The *Healy* Court itself noted that "[g]iven the latitude allowed a state under the Twenty-First Amendment to regulate the sale of liquor within its own borders, the holding in *Seagram* might well validate beer price regulation less intrusive than the present Connecticut statute, such as a requirement simply that a brewer set its Connecticut prices at the lowest levels it chooses to set in the surrounding states ... leaving those out-of-state prices unregulated by Connecticut." 692 F.2d at 283-84 (citation omitted). *Cf. United States Brewers Ass'n v.*

Rodriguez, 104 S.Ct. 1581 (1984) (Stevens, J., concurring in dismissal of appeal) (*Healy* does not undermine the validity of *Seagram v. Hostetter*).

We understand *Healy* to require invalidation of a prospective affirmation statute only when the practical effect of the statutory scheme is to prohibit a manufacturer from raising or lowering prices in another state for a given period of time. We are not persuaded that the New York statute has such an effect.*

As is evident from our earlier summary of its provisions, the New York statute is not identical to the statute invalidated in *Healy*. The New York statute provides, as the Connecticut statute did not, that liquor may be sold in New York at a price other than the scheduled price provided that "prior written permission of the [SLA] is granted for good cause shown and for reasons not inconsistent with the purpose" of the statute. Section 101-b(3) (a). Thus, assuming that a mid-month price reduction in another state constitutes "good cause" and a "reason not inconsistent with the purpose" of New York's statute, it would appear that a distiller could make such a reduction without violating the New York statute so long as he applies to the SLA for permission to make a corresponding reduction in his New York prices. If this is so, it cannot be said that the practical effect of the statute is to prohibit a distiller from lowering prices in other states.

Plaintiff raises a number of objections to this interpretation of the statute. First, it contends that the "good cause" provision relates only to the statute's price *scheduling* requirement and "does not alter or modify the dictates of the *affirmation* provisions." *Plaintiff's Reply Mem.* at page 7, note * (emphasis added). By this, we understand plaintiff to argue that even if a distiller receives permission to lower his New York prices on the ground that he has lowered them elsewhere, he is still subject to prosecution under Section 101-b(3) (h) for having filed a "false" affirmation as to what his prices would be in other states. However, plaintiff has not alleged that the Section in question has been so interpreted at any time during the eighteen

years that it has been in effect, nor have we found any suggestion of such an interpretation in New York case law or the rules of the SLA. Nor do we consider that interpretation to be one that is sensible, or likely to be adopted by state authorities. Certainly, the possibility that it *might* be adopted is not grounds for invalidating the statute since it is well established that "statutes should be construed whenever possible so as to uphold their constitutionality." *United States v. Vuitch*, 402 U.S. 62, 70 (1971).

Plaintiff also contends that the "good cause" provision does no more than give the SLA power "to exempt parties from compliance with an otherwise facially unconstitutional statute" and accordingly does not validate the statute. *Plaintiff's Reply Mem.* at p. 7. So stated, the argument merely begs the question. If the "good cause" provision is construed to include price reductions in other states, then the statute is not unconstitutional on its faces.

Once again, we note that plaintiff has not alleged that the SLA has refused or failed to so interpret the statute, nor has this Court found any indication that the statute is not so interpreted.⁵ Since the acknowledged purpose of the statute is to prevent New York wholesalers from being charged higher prices than their counterparts in other states, *see Seagram v. Hostetter*, *supra*, 384, U.S. at 38-40, it is difficult to believe that a price reduction in other states does not come within the provision permitting an adjustment to New York prices "for good cause shown and for reasons not inconsistent with purpose of" the statute.

Finally, plaintiff suggests that the "good cause" provision is discretionary and for that reason insufficient to validate the statute. *See Plaintiff's Reply Mem.* at pp. 7-8. We note, however, that the Supreme Court itself in *Seagram v. Hostetter* found the discretionary nature of the "good cause" provision no bar to reliance on it as a means of avoiding conflict with federal antitrust laws. 384 U.S. at 46. As the Court observed, we cannot presume that state authorities will not exercise their discretion in a manner that avoids conflict with federal law. *Id.*

Significantly, despite the fact that the amended New York affirmation statute has been in effect for eighteen years, plaintiff has not suggested how that statute has, *in practice*, proved more burdensome than the statute as originally enacted. The affidavit submitted by M. Jacqueline McCurdy, Vice President-Industry Relations for Seagram, is the only offer of proof on the statute's effect on the liquor industry, and the effect which is discussed by that affidavit (namely, the industry's inability to lower prices only in certain states to reflect seasonal preferences or to meet competition by regional brands) applies as much to the statute as originally enacted as to the statute as amended. Plaintiff's offer of proof, in other words, is relevant to the question whether liquor price affirmation statutes in general are permissible (a question answered in the affirmative by the Supreme Court in *Seagram v. Hostetter*), but it does not support an argument that the New York statute as amended imposes a greater burden on interstate commerce than did the statute upheld by the Supreme Court in *Seagram*.⁶

In sum, with respect to plaintiff's first challenge to the constitutionality of New York's affirmation statute, we find that *United States Brewers Ass'n v. Healy* does not call for invalidation of the statute as amended. The statute struck down in *Healy* was one whose practical effect was to prohibit manufacturers from raising or lowering prices in other states. The New York statute, in contrast, is susceptible of an interpretation which avoids that effect. We may not assume that the state authorities have adopted, or will in the future adopt, a different interpretation. Nor has plaintiff offered any proof that the statute as interpreted or applied by the SLA does in fact create the extraterritorial effect condemned in *Healy*. Indeed, the offer of proof submitted by plaintiff suggests that its complaint is with affirmation statutes generally, not simply with the amendment of the New York statute.

The Current Validity of *Seagram v. Hostetter*

Plaintiff's second challenge to the New York statute does, in fact, challenge affirmation statutes generally. Plaintiff contends

that price parity requirements constitute "protectionist" legislation, which is forbidden by the Commerce Clause, and that the statute is not saved by the Twenty-First Amendment since that amendment is inapplicable to protectionist legislation. In essence, plaintiff argues that the Supreme Court's recent decision in *Bacchus Imports, Ltd v. Dias*, *supra*, overruled the Court's earlier holding in *Seagram v. Hostetter* that a liquor price affirmation statute is a permissible exercise of the regulatory authority granted to the states by the Twenty-First Amendment.⁷

The statute at issue in *Bacchus* was in Hawaii tax statute that exempted certain locally produced alcoholic beverages from its provisions. The acknowledged purpose of the exemption was to encourage development of the Hawaiian liquor industry. 104 S.Ct. at 3053. The Supreme Court held the tax to be discriminatory both in purpose and effect, and therefore invalid under the Commerce Clause. In addition, finding that the tax "violate[d] a central tenet of the Commerce Clause [and was] not supported by any clear concern of the Twenty-First Amendment," the Court rejected a claim that the Twenty-First Amendment saved the statute. 104 S.Ct. at 3059. The Court observed that "[t]he central purpose of the [Amendment] was not to empower states to favor local industries by erecting barriers to competition," that the Commerce Clause "furthers strong federal interests in preventing economic Balkanization," and that as a result, "[s]tate laws that constitute mere economic protectionism are ... not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor." 104 S.Ct. at 3058.

Plaintiff contends that New York's affirmation statute is similarly protectionist and therefore similarly invalid. An affirmation statute, however, is not protectionist in the sense in which that term has been used by the courts. It does not seek to promote local trade by forbidding or discouraging the importation of articles of commerce from another state. *See, e.g., Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S.

333 (1977). Nor does it seek to give local residents preferred or exclusive access to the products of a state. *See, e.g., New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982).

Plaintiff cites *Baldwin v. G.A.F. Seelig*, 294 U.S. 511 (1935) in support of its contention that price affirmation statutes such as New York's are protectionist. However, a comparison of the statute at issue in *Seelig* with the New York statute merely confirms that the latter is not protectionist in the traditional sense of the term.

The statute in *Seelig* set a minimum price for the sale of milk in New York and prohibited the resale of milk in New York that had been purchased out of state at a price below the New York statutory minimum. The Supreme Court held that the statute was invalid under the Commerce Clause on the ground that it attempted to impose New York's minimum price for milk on other states (an issue we have already discussed in connection with plaintiff's challenge based on *United States Brewers Ass'n v. Healy*), and also on the ground that it sought to protect local dairy farmers by neutralizing the economic advantage which its out-of-state competitors had in the New York market. Justice Cardozo, writing for the Court, found the statute to be the functional equivalent of an import tax in the amount of the difference between out-of-state prices and the New York statutory minimum. 294 U.S. at 521-22.

New York's affirmation statute, by contrast, does not constitute state interference with competition between local and out-of-state industries. The statute instead requires members of a particular industry (whether they are local or out of state) to offer their products to New Yorkers at prices that are no higher than those offered to other states. Such a statute may have an effect on interstate commerce (arguably even a significant anticompetitive effect), but it does not seek to discourage interstate commerce, and thus cannot properly be characterized as protectionist.

Plaintiff would expand the definition of "protectionism" to include any statute that "solely seeks to benefit residents at the

expense of residents in other states." *Plaintiff's Mem.* at 19. However, such an expansion of the term is plainly inappropriate. It is a rare statute that does *not* seek to benefit local residents, and the qualifying phrase "at the expense of residents in other states" is far too vague to describe a category of statutes that are considered virtually unconstitutional *per se*. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).⁸

We believe that the term "protectionist" should be limited to its traditional usage — that is, to statutes which forbid or discourage interstate trade and thus conflict so fundamentally with the principles underlying the Commerce Clause that a *per se* rule of invalidation is appropriate.⁹ With respect to statutes which do not fall into that category, the appropriate approach is to balance the state's interest in enacting the statute against its effects on interstate commerce. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

Indeed, that approach was the one taken by the Supreme Court in *Seagram v. Hostetter*, *supra*, when it upheld the constitutionality of New York's original affirmation statute. The Court noted that the Twenty-First Amendment gave the states broad authority to regulate the importation and distribution of alcoholic beverages, 384 U.S. at 41-43, and found that the alleged extraterritorial effects of the statute were "largely matters of conjecture." *Id.* at 43. In particular, the Court observed that it "is by no means clear ... that [the statute] must inevitably produce higher prices in other states, as claimed by appellants, rather than the lower prices sought for New York." *Id.*

We see no reason to question the conclusion of the Court in *Seagram* and, in any case, have little authority to disturb it. Nonetheless, since the Supreme Court's recent decision in *Bacchus* reflects a heightened concern that the purpose of a state's regulatory enactments bear some relation to the purposes of the Twenty-First Amendment, we pause to note the relation that exists with respect to New York's affirmation statute.

Although the New York statute was one of the first statutory enactments of its kind, New York was by no means one of the first states to impose a price parity requirement on liquor suppliers. At the time of the New York statute's enactment, the seventeen states which operated state liquor monopolies imposed the same obligation in their contracts with liquor suppliers. See *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 16 N.Y.2d 47, 57-58 (1965), *aff'd*, 384 U.S. 35 (1966); *Seagram v. Hostetter*, *supra*, 384 U.S. at 43-45. These so-called monopoly states were able to induce liquor suppliers to undertake such an obligation by virtue of the leverage they possessed as high-volume purchasers. 384 U.S. at 44 n.14. Indeed, at the time *Seagram v. Hostetter* was decided, the State of Pennsylvania reportedly was the largest purchaser of liquor in the world. *Id.*

Both the New York Court of Appeals and the Supreme Court found the willingness of distillers to enter price affirmation contracts to be an indication that the practice of requiring price affirmations did not impose an unreasonable burden on interstate commerce. 16 N.Y.2d at 57; 384 U.S. at 43-45. We believe that the affirmation requirements of the monopoly states are also relevant to the validity of a price affirmation statute as an exercise of the authority granted to the states by the Twenty-First Amendment.

As plaintiff has noted, by requiring a distiller to adopt a single, market-wide price for its products, an affirmation statute arguably could have an anticompetitive effect. See Affidavit of M. Jacqueline McCurdy at pp. 7-9. Indeed, which respect to commodities other than alcoholic beverages, it seems unlikely that a state could point to an interest sufficient to outweigh that potential effect. As suggested above, however, market conditions are significantly different with respect to alcoholic beverages.

By virtue of the unique authority which the Twenty-First Amendment grants to the states to control the importation and distribution of alcoholic beverages, state monopolies are permissible where they would not be otherwise. A side effect of

that authority is a market in which monopoly states can exert disproportionate leverage. As a result, price affirmation statutes for alcoholic beverages can be justified (as they cannot be for other commodities) as a reasonable means of responding to the market irregularities created by the Twenty-First Amendment, and we believe it is in accord with the purposes of the Amendment to interpret it as authorizing such a response.¹⁰ Thus, with respect to price affirmation statutes, it is particularly appropriate to observe that the rules governing trade in liquor are simply not the same as those governing "trade in bicycles, or cosmetics, or furniture." *Seagram v. Hostetter*, *supra*, 16 N.Y.2d at 56.

In sum, we find no basis for disturbing the Supreme Court's holding in *Seagram v. Hostetter* with respect to the constitutionality of the liquor price affirmation statutes. Such statutes are not "protectionist" in the sense in which that term has been used in constitutional analysis, and thus their constitutionality is not called into question by the Supreme Court's recent decision in *Bacchus Imports, Ltd. v. Dias*. Nor is the Supreme Court's ruling in *Seagram* now questionable in light of the heightened emphasis placed by *Bacchus* on the purposes of the Twenty-First Amendment since liquor price affirmation statutes are in accord with those purposes.

Accordingly, for the reasons stated, plaintiff's motion for summary judgment is denied; defendants' motion is granted.

SO ORDERED.

Dated: New York, New York
May 22, 1985

LEONARD B. SAND

U.S.D.J.

FOOTNOTES

¹ The present motion is a further stage in proceedings which were the subject of this Court's Opinion and order of September 29, 1983, declining to issue a preliminary injunction against the application of New York's affirmation statute to plaintiff's Chivas Regal Quantity Discount Plan for October, 1983. An application for a stay of that order was argued before Judge Kearse of the Court of Appeals for the Second Circuit but was withdrawn before a decision was rendered. See Transcript of oral argument before this Court, October 11, 1984, p.5. Plaintiff subsequently amended its complaint to seek declaratory and injunctive relief on the ground that New York's affirmation statute is, on its face, violative of the Commerce Clause.

Plaintiff's amended complaint claims, in passing, that New York's affirmation statute is unconstitutional both "on its face and as applied." First Amendment Complaint, paragraph 12 (emphasis added). However, plaintiff has not identified either in its amended complaint or in its motion for summary judgment, any particular interpretation of the statute by the SLA with which it takes issue. Moreover, both in its papers filed with the Court and at oral argument, plaintiff has consistently characterized its amended complaint as a challenge to the *facial* constitutionality of the statute. As a result, we do not regard the issue of the statute's constitutionality as applied as having been presented to this Court for resolution.

Defendants have challenged the amended complaint on the ground that it fails to state a case or controversy. That challenge, however, is clearly without merit since it is conceded that the statute in question is being enforced and that plaintiff is subject to its requirements. See, e.g., *Steffel v. Thompson*, 415 U.S. 452 (1974); *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498 (1972).

² Last month, in *Brown-Forman Distillers Corp. v. State Liquor Authority*, No. 12880/1982 (N.Y. April 2, 1985), the New York Court of Appeals reached a similar conclusion, though on grounds differing from those relied on by this Court. See *infra*, note 4.

³ The statute was amended because its requirement of an affirmation based on the preceding month's prices had proven unworkable in a number of respects. Among them was the effect such a requirement had on a distiller's ability to raise prices in other states with affirmation requirements. A distiller could not raise prices in any state with an affirmation requirement based on *current* prices unless it *simultaneously* discontinued sales for a month in each state having an affirmation requirement based on the *preceding* month's prices. Nor could a distiller raise prices in any state with an affirmation requirement based on the *preceding* month's prices unless it first discontinued sales for a month in all other states having that requirement. At the urging of numerous distillers, among others, the law was amended to require an affirmation based upon *current* prices. See generally N.Y.L.1967 ch.798 Governor's Bill Jacket.

⁴ In *Brown-Forman Distillers Corp. v. State Liquor Authority*, *supra*, the New York Court of Appeals found that statute struck down in *Healy* to be distinguishable from New York's affirmation statute on grounds of purpose and degree of control over pricing in other states. Neither ground is relied upon by this Court.

With respect to purpose, the *Brown-Forman* court suggested that "the Connecticut statute was designed to discriminate against out-of-state businesses" and thus was protectionist, "while the intent of the New York statute was to prevent continued discrimination against in-state consumers" and thus should not be characterized as protectionist. *Brown-Forman*, *slip op.* at 8. As plaintiff notes, however, the Court in *Healy* clearly held that it need not determine the permissibility of the Connecticut statute's purpose since its extra-territorial effect would invalidate it in any case. See *Healy*, 692 F.2d at 281-82. Moreover, we do not believe that either statute can be said to "discriminate" against out-of-state businesses in the sense in which that term has been used in constitutional analysis. See *infra*, at 11 & n.8.

The second basis upon which the Court in *Brown-Forman* distinguished *Healy* is similarly problematic. The New York court

suggested that the impact of the New York statute was "slight" in comparison with that of the Connecticut statute because the former was "nationwide in scope and imitated by approximately 20 other states throughout the nation," and because liquor, unlike beer, is already subject to state and federal price control and therefore less "susceptible to free price fluctuation." *Brown-Forman*, *slip op.* at 9.

The inquiry required by *Healy*, however, is *whether* a statute effectively regulates pricing in other states; the number of states involved is irrelevant. Similarly, while we share the New York court's reluctance to invalidate a statute on the basis of an amendment that, as a matter of practical effect on interstate commerce, appears to have done more good than harm, see *infra*, p.7 and note 6, nonetheless, as a matter of constitutional theory, we doubt that the validity of a statute under the Commerce Clause can depend upon how many states have enacted it.

⁵ Indeed, the facts underlying plaintiff's suit provide some indication that the statute is interpreted with appropriate flexibility. After the SLA disapproved plaintiff's proposed Chivas Regal Quality Discount Plan for October 1983, it did not insist that Seagram forgo the Plan in other states. Instead, it offered to grant approval for Seagram to offer a cash discount in New York equivalent to the product discounts it would offer in other states. See *Joseph E. Seagram & Sons, Inc. v. Gazzara, et al.*, 83 Civ. 6825, *slip op.* at 5, (S.D.N.Y. September 28, 1983).

⁶ Given the effect of the original statute, see *supra*, note 3, it would seem that the amended version is, if anything, less of a burden on interstate commerce.

⁷ Plaintiff's memorandum in support of its motion for summary judgment cites cases involving commodities other than liquor for the proposition that price parity requirements are "protectionist," and *Bacchus* for the proposition that the Twenty-First Amendment is inapplicable to protectionist legislation. No mention of *Seagram v. Hostetter* is made, presumably because plaintiff believes it to have been impliedly overruled by *Bacchus*.

⁸ If that language were adopted as the standard, it arguably would invalidate statutes such as a property tax abatement intended to encourage businesses to relocate to a state, a statute establishing a commission to take measures to increase a state's share of the tourist trade, or any other statute that sought to draw business away from another state. Such statutes may be "discriminatory" or "protectionist" in a colloquial sense, but not in the sense in which courts have used these terms in constitutional analysis. The statutes cannot be said to discriminate against trade among the states. *Cf. City of Philadelphia v. New Jersey, supra*, 437 U.S. at 623-28.

⁹ Certainly, *Bacchus* does not support a broader definition of "protectionism." The statute invalidated in that case fell squarely within traditional usage of the term, and the Court emphasized that it was dealing with a statute that violated "a central tenet" of the Commerce Clause. *Bacchus*, 104 S.Ct. at 3059; *see also Loretto Winery, Ltd. v. Gazzara*, 601 F.Supp. 850 (S.D.N.Y. 1985), *aff'd*, No. 85-7197 (2d Cir. May 10, 1985) (*Bacchus* requires invalidation of a statute that permitted a particular wine product to be sold in supermarkets as well as liquor stores, provided that it was made exclusively from New York State grapes).

¹⁰ Moreover, by counterbalancing a monopoly state's disproportionate leverage in the liquor market, affirmation statutes arguably serve the interests of the Commerce Clause as well since they are more likely to relieve than to exacerbate the " 'mutual jealousies and aggressions of the States' " which concerned the Framers of the Commerce Clause. *Baldwin v. G.A.F. Seelig, supra*, 294 U.S. at 522 (quoting Farrand, Records of the Federal Convention, Vol. II, p.308).

REPLY BRIEF

BEST AVAILABLE COPY

No. 84-2030

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Supreme Court, U.S.

FILED

SEP 23 1985

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
October Term, 1984

BROWN-FORMAN DISTILLERS CORPORATION,
Appellant,
v.

STATE OF NEW YORK LIQUOR AUTHORITY,
Appellee.

On Appeal from the Court of Appeals of New York

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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September 20, 1985

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No. 84-2030

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Supreme Court of the United States
October Term, 1984

BROWN-FORMAN DISTILLERS CORPORATION,
Appellant,

v.

STATE OF NEW YORK LIQUOR AUTHORITY,
Appellee.

On Appeal from the Court of Appeals of New York

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

Appellant, Brown-Forman Distillers Corporation ("Brown-Forman"), submits this brief in reply to new matter raised in the motion to dismiss or affirm filed by appellee, State of New York Liquor Authority ("SLA").

That new matter pertains solely to Brown-Forman's contention that the New York affirmation statute, on its face, violates the Commerce Clause, because it extraterritorially regulates prices in all other states.* Specifically,

* The SLA states (p. 2) that the facial attack on the statute "goes beyond the pleadings of this case." The majority opinion of the New York Court of Appeals, however, demonstrates that the highest court of the state entertained Brown-Forman's facial challenge and expressly ruled upon it. (5a-10a, Appendix to the Jurisdictional Statement)

New York requires that for any brand of spirits sold there a price must be posted; then, for the period that price is posted, New York prospectively prohibits sale at a lower price anywhere else, thus establishing the New York price as a floor below which the brand cannot thereafter be sold in any state.

A. The Recent Federal District Court Decision Upon Which The SLA Relies To Defend The Facial Challenge To The New York Affirmation Statute Is Not Sound, And It Emphasizes The Need For This Court To Note Probable Jurisdiction

The SLA relies upon *Joseph E. Seagram & Sons, Inc. v. Gazzara*, 83 Civ. 6825 (LBS) (S.D.N.Y. May 22, 1985), appeal docketed, No. 85-7547 (2d Cir. July 1, 1985), decided after the decision by the Court of Appeals of New York from which this appeal is taken. In *Gazzara*, the district court rejected a facial attack upon the New York affirmation statute. The federal court distinguished *United States Brewers Association, Inc. v. Healy*, 692 F.2d 275 (2d Cir. 1982), *aff'd mem.*, — U.S. —, 104 S. Ct. 265 (1983), on the ground that purportedly the New York statute (unlike the Connecticut statute found unconstitutional in *Healy*) does not “prohibit a manufacturer from raising or lowering prices in another state for a given period of time.” (App. 4)* That conclusion was based upon the following assumptions (App. 4):

“... The New York statute provides, as the Connecticut statute did not, that liquor may be sold in New York at a price other than the scheduled price provided that ‘prior written permission of the [SLA] is granted

* “App.” references are to the appendix to the SLA motion.

for good cause shown and for reasons not inconsistent with the purpose’ of the statute. Section 101-b(3)(a). Thus, assuming that a mid-month price reduction in another state constitutes ‘good cause’ and a ‘reason not inconsistent with the purpose’ of New York’s statute, it would appear that a distiller could make such a reduction without violating the New York statute so long as he applies to the SLA for permission to make a corresponding reduction in his New York prices. If this is so, it cannot be said that the practical effect of the statute is to prohibit a distiller from lowering prices in other states.”

The state Court of Appeals, however, rejected Brown-Forman’s facial challenge on wholly different grounds. As the federal court expressly recognized (App. 12, n.2), its analysis finds no support in the decision of the highest court of New York, which upheld the affirmation statute on totally different reasoning. (See Jurisdictional Statement, pp.9, 19-24). On the other hand, the federal court unequivocally rejected the reasoning of the state court in this case. (App. 13-14, n.4)

Brown-Forman submits that the decision in *Seagram v. Gazzara* (now on appeal to the Court of Appeals for the Second Circuit) is not controlling and is unsound.

First, accepting its assumptions (for which no judicial precedent is cited), that decision ignores the fact that prices in other states cannot be lowered below the price affirmed in New York at least for the time necessary to seek and obtain the permission of the SLA even if that agency exercises its discretion in favor of such an application. Extraterritorial regulation of prices in other states for a shorter rather than longer period is no less in violation of the Commerce Clause.

Second, a statute unconstitutional on its face cannot be upheld on the basis that an agency of the state has the discretion to waive or modify its otherwise unconstitutional impact. *Cf. Public Utilities Commission v. United States*, 355 U.S. 534 (1958).

Conclusion

The decision in *Seagram v. Gazzara* further underlines the need for this Court to note probable jurisdiction and resolve the substantial issues of great economic moment which continue to arise in connection with affirmation laws and which are producing conflicting and irreconcilable judicial responses.

Respectfully submitted,

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September 20, 1985

JOINT APPENDIX

DEC 2 1985

JOSEPH A. SPANIEL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1984

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On Appeal from the Court of Appeals of New York

JOINT APPENDIX

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Appeal Docketed July 1, 1985
Probable Jurisdiction Noted Oct. 7, 1985

1161-282

No. 84-2030

IN THE
Supreme Court of the United States
 October Term, 1984

BROWN-FORMAN DISTILLERS CORPORATION,
Appellant.
 v.
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Appellee.

On Appeal from the Court of Appeals of New York

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The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Jurisdictional Statement:

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Majority and Dissenting Opinions of the Appellate Division, First Department, dated March 8, 1984	J.S. App. 37a
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Order of Affirmance and Remittitur of the New York Court of Appeals, filed April 9, 1985	J.S. App. 35a

Chronological List of Relevant Docket Entries

June 4, 1982—Appellant Brown-Forman's Article 78 petition filed in the Special Term of the New York State Supreme Court, New York County, seeking review and reversal of Appellee State Liquor Authority's determination.

June 23, 1982—Appellee's answer filed.

July 8, 1982—Article 78 proceeding transferred to the Appellate Division, First Department of the New York State Supreme Court.

March 4, 1983—Appellant's brief filed in the Appellate Division, First Department.

December 13, 1983—Appellee's brief filed.

December 20, 1983—Appellant's reply brief filed.

March 8, 1984—Majority and dissenting opinions and order of the Appellate Division, First Department.

April 20, 1984—Appellant's notice of appeal and jurisdictional statement filed in the New York Court of Appeals.

June 25, 1984—Appellant's brief filed in the New York Court of Appeals.

September 5, 1984—Appellee's brief filed.

Chronological List of Relevant Docket Entries

April 2, 1985—Majority and dissenting opinions and judgment of the New York Court of Appeals.

April 9, 1985—Order of Affirmance and Remittitur of the New York Court of Appeals filed.

Notice of Petition

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Index No. 12880/82

In the Matter of the Application of
BROWN-FORMAN DISTILLERS CORPORATION, Wholesale Liquor
License No. LL-585, 555 Madison Avenue, New York, N.Y.
Petitioner,

for a Judgment pursuant to ARTICLE 78
of the Civil Practice Law and Rules,

against

STATE LIQUOR AUTHORITY,

Respondent.

In the Matter of the Application of
BROWN-FORMAN DISTILLERS CORPORATION, Wholesale Liquor
License No. LL-1009, One North Broadway, White Plains,
N.Y.

Petitioner,

for a Judgment pursuant to ARTICLE 78
of the Civil Practice Law and Rules,

against

STATE LIQUOR AUTHORITY,

Respondent.

SIRS:

PLEASE TAKE NOTICE, that upon the annexed Petition of
BROWN-FORMAN DISTILLERS CORPORATION, duly verified June

Notice of Petition

4, 1982, with exhibits annexed thereto, the undersigned will apply to this Court, at a Special Term, Part I thereof, to be held in and for the County of New York, at 60 Centre Street, New York, New York, County of New York on June 30, 1982, at 9:30 a.m., or as soon thereafter as counsel can be heard, for an order, pursuant to Section 7804(g) of the Civil Practice Law and Rules, directing that the proceedings herein be transferred for disposition to a term of the Appellate Division, First Judicial Department, or, in the alternative, that a judgment be entered in favor of the Petitioner pursuant to Article 78 of the Civil Practice Law and Rules reviewing and annulling, as affected by error of law, or as arbitrary and capricious, or as an abuse of discretion, or as in excess of respondent's authority, or as unconstitutionally applying the provisions of the Alcoholic Beverage Control Law in violation of the Commerce Clause of the United States Constitution, or as not, on the entire record, supported by substantial evidence, the February 5, 1982, decision of Respondent State Liquor Authority, which determined that Petitioner had violated §101-b, subd. 3, of the Alcoholic Beverage Control Law, and for such other and further relief as the Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE, that pursuant to Section 7804(c) and (e) of the Civil Practice Law and Rules, a verified answer and supporting affidavits, if any, must be served at least five (5) days before the date on which this petition is noticed to be heard and Respondent shall file with the Clerk of the Court a certified transcript of the record of the proceedings to be considered herein.

Notice of Petition

Petitioner designates New York County as the place of trial. The basis of venue is CPLR Section 506(b), in that the material events took place in New York County and Respondent maintains offices, brought the proceedings, and made the determination complained of in New York County.

Dated: New York, New York
June 4, 1982

Yours, etc.

SCHREIBER TUNICK & MAC KNIGHT
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and

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Verified Petition

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No.

In the Matter of the Application of
BROWN-FORMAN DISTILLERS CORPORATION, Wholesale Liquor
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Petitioner,

for a Judgment pursuant to ARTICLE 78
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against

STATE LIQUOR AUTHORITY,

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In the Matter of the Application of
BROWN-FORMAN DISTILLERS CORPORATION, Wholesale Liquor
License No. LL-1009, One North Broadway, White Plains,
N.Y.

Petitioner,

for a Judgment pursuant to ARTICLE 78
of the Civil Practice Law and Rules,

against

STATE LIQUOR AUTHORITY,

Respondent.

TO THE SUPREME COURT OF THE STATE OF NEW YORK:

Petitioner, BROWN-FORMAN DISTILLERS CORPORATION, for
its petition, in each of the above-captioned proceedings,

Verified Petition

pursuant to Article 78 of the Civil Practice Law and Rules,
alleges:

1. The petitioner is, and at all times hereinafter mentioned was, duly licensed to sell liquor and wine at wholesale in the State of New York, holding Wholesale Liquor License No. LL-585 issued by respondent for premises located at 555 Madison Avenue, New York, N.Y., and Wholesale Liquor License No. LL-1009 for premises located at one North Broadway, White Plains, N.Y.

2. The respondent is the duly constituted agency existing under and by virtue of the Alcoholic Beverage Control Law of the State of New York (L. 1934, c. 478), having an office in the City and County of New York, and which issued said license to the petitioner.

3. On or about May 22, 1981, respondent commenced proceedings to cancel or revoke petitioner's wholesale liquor licenses, charging that petitioner had violated the "affirmation" provisions of the Alcoholic Beverage Control Law (Section 101-b, subdivision 3). Annexed hereto as Exhibit A is a copy of the Notice of Pleading and Hearing setting forth the charges in each proceeding.

4. On October 27, 1981, a hearing in each proceeding was held, at which a stipulation in lieu of testimony and other evidence was made of record.

5. Subsequent to the conclusion of each hearing, the Hearing Officer sustained the charges. Annexed hereto as Exhibit B is a copy of the Hearing Officer's findings in each proceeding.

Verified Petition

6. On or about February 5, 1982, respondent adopted the findings of the Hearing Officer in each proceeding and issued an order imposing a bond forfeiture and a ten (10) day deferred suspension of each of petitioner's licenses.

7. The evidence adduced at the hearings did not establish a violation of the law on the part of petitioner.

8. Respondent's determination is arbitrary and capricious, affected by an error of law, an abuse of discretion, in excess of respondent's authority, and unsupported by substantial evidence.

9. Respondent's application of the "affirmation" provisions of the Alcoholic Beverage Control Law (Section 101-b, subdivision 3) imposes an unreasonable burden on interstate commerce in violation of Article I, §8, clause 3 of the United States Constitution.

10. Petitioner has instituted these proceedings to review the determinations of the respondent, each made after a hearing, and for a judgment annulling each such determination.

11. Respondent's determinations are subject to review by this Court pursuant to subdivision 4 of Section 121 of the Alcoholic Beverage Control Law.

12. Petitioner has no other available remedy at law or equity.

Verified Petition

13. This Court is specifically empowered to entertain a special proceeding of the nature herein involved by virtue of the provisions contained in subdivisions (b) and (g) of Section 7804 and subdivision (b) of Section 506 of the Civil Practice Law and Rules.

14. No previous application has been made to this Court or any other court for the relief sought herein.

WHEREFORE, your petitioner prays for an order, transferring these proceedings, for review and determination, to the Appellate Division, First Department, in accordance with subdivision (g) of Section 7804 of the Civil Practice Law and Rules, and a judgment that the determinations of the respondent be annulled and vacated, and for such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
June 4, 1982

BROWN-FORMAN DISTILLERS
CORPORATION

By: /s/ William B. Schreiber

A10

Verified Petition

Verification

State of New York)
County of New York) ss.:

WILLIAM B. SCHREIBER, being duly sworn, deposes and says that he is a member of the firm of Schreiber Tunick & Mac Knight, attorneys for Petitioner in this proceeding and that the foregoing Petition is true to his own knowledge, except as to matters therein stated on information and belief and as to those matters he believes it to be true; that the grounds of his belief as to all matters not stated upon his knowledge are correspondence and other writings furnished to him by Petitioner and interviews with officers and employees of Petitioner; and that the reason why the Verification is not made by Petitioner is that Petitioner is a foreign corporation.

/s/ WILLIAM B. SCHREIBER
WILLIAM B. SCHREIBER

Sworn to before me this
4th day of June, 1982.

/s/ MICHAEL T. KELLY
Notary Public
MICHAEL T. KELLY
Notary Public, State of New York
No. 03-4694991
Qualified in Westchester County
Commission Expires March 30, 19

A11

Exhibit A—Notice of Pleading and Hearing

STATE OF NEW YORK
LIQUOR AUTHORITY
250 Broadway
New York, N.Y. 10007

NOTICE OF PLEADING AND HEARING

IN THE MATTER OF PROCEEDINGS TO CANCEL OR REVOKE

Serial No. LL-585

Issued to: Brown-Forman Distillers Corp.

Licensed Premises: 555 Madison Avenue
New York, N.Y.

PLEASE TAKE NOTICE that pursuant to Section 118 of the Alcoholic Beverage Control Law you are required to appear at the office of the State Liquor Authority, 250 Broadway, New York City, 16th floor, on June 12, 1981 at 10:00 A.M. in connection with proceedings to revoke the above license, and to plead to the following charges:

That the licensee filed affirmations in connection with schedules filed with the Authority, since on or about May 1979, in which it stated that the price of brands of liquor to wholesalers as set forth in the schedules would be no higher than the lowest price at which such brands of liquor would be sold by the licensee to wholesalers in any other state of the United States, whereas in truth and in fact, the licensee during the same period of time provided allowances and/or inducements to wholesalers in other states which effectively, caused the price of those brands of liquor to wholesalers in those other states to be lower than the price to wholesalers in New York State; all in violation of Section 101-b, subdivision 3(d) of the Alcoholic Beverage Control Law.

Exhibit A—Notice of Pleading and Hearing

PLEASE TAKE FURTHER NOTICE THAT YOUR FAILURE TO PLEAD WILL BE DEEMED A "NO CONTEST" PLEA AND NO FURTHER HEARING WILL BE HELD.

PLEASE TAKE FURTHER NOTICE that you may be represented by counsel.

PLEASE TAKE FURTHER NOTICE that you may plead to the charges by mail instead of by personal appearance provided that a letter signed by you or your attorney, setting forth your plea of "Not Guilty" or "No Contest" is received by the Hearing Bureau of the State Liquor Authority at the above address on or before the pleading date specified above.

PLEASE TAKE FURTHER NOTICE: If you plead "Not Guilty" to the charges, a hearing will thereafter be scheduled at which you may appear with counsel, produce witnesses and introduce evidence in your behalf.

To: 555 Madison Avenue
New York, N.Y.
(Licensed Premises) (Certified Mail) 493389

To: Benjamin H. Morris
2005 High Ridge Rd., Louisville, KY. 40207
(Residence)

To: New York City A.B.C. Board

To: Illegible
(Landlord)
MJG:sm

DATE: May 22, 1981

STATE LIQUOR AUTHORITY
(Illegible)

AS COUNSEL

Exhibit A—Notice of Pleading and Hearing

STATE OF NEW YORK

LIQUOR AUTHORITY

250 Broadway

New York, N.Y. 10007

NOTICE OF PLEADING AND HEARING

IN THE MATTER OF PROCEEDINGS TO CANCEL OR REVOKE

Serial No. West LL 1009

Issued to: Brown Forman Distillers Corp.

Licensed Premises: One North Broadway
White Plains, N.Y.

PLEASE TAKE NOTICE that pursuant to Section 118 of the Alcoholic Beverage Control Law you are required to appear at the office of the State Liquor Authority, 250 Broadway, New York City, 16th floor, on June 12, 1981 at 10:00 A.M. in connection with proceedings to revoke the above license, and to plead to the following charges:

That the licensee filed affirmations in connection with schedules filed with the Authority, since on or about May 1979, in which it stated that the price of brands of liquor to wholesalers as set forth in the schedules would be no higher than the lowest price at which such brands of liquor would be sold by the licensee to wholesalers in any other state of the United States, whereas in truth and in fact, the licensee during the same period of time provided allowances and/or inducements to wholesalers in other states which effectively, caused the price of those brands of liquor to wholesalers in those other states to be lower than the price to wholesalers in New York State; all in violation of Section 101-b, subdivision 3(d) of the Alcoholic Beverage Control Law.

Exhibit A—Notice of Pleading and Hearing

PLEASE TAKE FURTHER NOTICE THAT YOUR FAILURE TO PLEAD WILL BE DEEMED A "NO CONTEST" PLEA AND NO FURTHER HEARING WILL BE HELD.

PLEASE TAKE FURTHER NOTICE that you may be represented by counsel.

PLEASE TAKE FURTHER NOTICE that you may plead to the charges by mail instead of by personal appearance provided that a letter signed by you or your attorney, setting forth your plea of "Not Guilty" or "No Contest" is received by the Hearing Bureau of the State Liquor Authority at the above address on or before the pleading date specified above.

PLEASE TAKE FURTHER NOTICE: If you plead "Not Guilty" to the charges, a hearing will thereafter be scheduled at which you may appear with counsel, produce witnesses and introduce evidence in your behalf.

To: One North Broadway
White Plains, N.Y.
(Licensed Premises) (Certified Mail) 493389

To: Benjamin H. Morris
2005 High Ridge Rd., Louisville, KY. 40207
(Residence)

To: Westchester A.B.C. Board

To: Illegible
(Landlord)
MJG:sm

DATE: May 22, 1981

STATE LIQUOR AUTHORITY
(Illegible)

AS COUNSEL

**Exhibit B—Determinations and Findings
of State Liquor Authority**

Previously reproduced in the appendix to Appellant's
Jurisdictional Statement at 48a-51a.

Answer

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 12880/82

In the Matter of the Application of
BROWN-FORMAN DISTILLERS CORPORATION, Wholesale Liquor
Licence No. LL-585, 555 Madison Avenue, New York, N.Y.
Petitioner,

for a Judgment pursuant to ARTICLE 78
of the Civil Practice Law and Rules,

against

STATE LIQUOR AUTHORITY,

Respondent.

In the Matter of the Application of
BROWN-FORMAN DISTILLERS CORPORATION, Wholesale Liquor
License No. LL-1009, One North Broadway, White Plains,
N.Y.

Petitioner,

for a Judgment pursuant to ARTICLE 78
of the Civil Practice Law and Rules,

against

STATE LIQUOR AUTHORITY,

Respondent.

Respondent, in this consolidated proceeding, by its attorney, Stanley Stein, Esq., as and for its answer to the petition herein, respectfully shows and alleges:

Answer

FIRST: That it denies each and every allegation contained in those paragraphs of the petition designated "7", "8" and "9".

SECOND: That it denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in those paragraphs of the petition designated "10", "12" and "14".

THIRD: That heretofore the respondent State Liquor Authority issued Wholesale Liquor licenses to the petitioner for premises located at One North Broadway, White Plains, New York and 555 Madison Avenue, New York, New York. Such licenses have been renewed annually thereafter upon application made therefor, the renewals thereof for the license years 1981-1982 and 1982-1983 having been made on stipulations, copies of which are annexed hereto as Exhibit "1".

FOURTH: That by notices dated May 22, 1981, copies of which are annexed to the petition as Exhibit "A" and made part hereof by reference thereto as Exhibit "2", the respondent Authority instituted proceedings pursuant to sections 118 and 119 of the Alcoholic Beverage Control Law to revoke petitioner's licenses on the following charge:

"That the licensee filed affirmations in connection with schedules filed with the Authority, since on or about May 1979, in which it stated that the prices of brands of liquor to wholesalers as set forth in the schedules would be no higher than the lowest price at which such brands of liquor would be sold by the licensee to wholesalers in any other state of the United States, whereas

Answer

in truth and in fact, the licensee during the same period of time provided allowances and/or inducements to wholesalers in other states which effectively caused the price of those brands of liquor to wholesalers in those other states to be lower than the price to wholesalers in New York State; all in violation of Section 101-b, subdivision 3(d) of the Alcoholic Beverage Control Law."

FIFTH: That, thereafter, petitioner pleaded "not guilty" to the charges, and revocation hearings were held thereon on October 27, 1981 before Hearing Officer Andrew Lee Aubry of the State Liquor Authority. The petitioner was present thereat by its Assistant Secretary, Leon R. Timmons and was represented by counsel. Evidence was received in support of the charges. The certified copies of the transcripts of the revocation hearings and the exhibit introduced in evidence thereat are annexed hereto as Exhibit "3".

SIXTH: That after the completion of the revocation hearings and after due consideration of the evidence presented thereat, Hearing Officer Aubry prepared for the consideration of the Members of the Authority summaries and statements of findings wherein he found that the charges had been sustained. Copies of the summaries and statements of findings of Hearing Officer Aubry are annexed to the petition as Exhibit "B" and made part hereof by reference thereto as Exhibit "4".

SEVENTH: That, thereafter, the attorneys for the petitioner submitted purported controversions of the findings

Answer

of the Hearing Officer in each proceeding. Copies of such purported controversions are annexed hereto as Exhibit "5".

EIGHTH: That, thereafter, at a regular meeting of the State Liquor Authority, held on February 3, 1982, the Members thereof, having duly considered and appraised the evidence presented at the revocation hearings, the summaries and statements of findings of the Hearing Officer in the respective proceedings and the purported controversions of such findings submitted by the attorneys for the petitioner, adopted the Hearing Officer's findings and sustained the charges. The Members then determined that the appropriate penalty to be imposed in each proceeding was suspension of petitioner's license for ten days (to be deferred) plus a forfeiture of its bond in the sum of \$20,000 (Commissioner Doyle voted to cancel each license and to impose a \$20,000 bond forfeiture in each proceeding). Copies of the Authority's memoranda decisions and the Orders of Deferred Suspension and bond forfeitures are annexed hereto as Exhibits "6" and "7", respectively.

NINTH: That there was substantial evidence to sustain the respondent Authority's determinations that petitioner had violated the Alcoholic Beverage Control Law in the manner charged and found.

TENTH: That in imposing the measure of penalty involved in said determinations deferring suspension of petitioner's licenses and forfeiting its bonds in the sum of \$20,000, the Members of the Authority duly considered and

Answer

appraised the nature and gravity of violations involved as well as petitioner's record as a licensee for law observance.

ELEVENTH: That the penalties so imposed were made after hearings duly held pursuant to statute and were acting within the discretion vested in the State Liquor Authority by sections 2, 17, 112 and 118 of the Alcoholic Beverage Control Law.

TWELFTH: That in making said determinations of ten-days deferred suspension with bond forfeitures, the respondent Authority did not abuse its discretion nor was it arbitrary or capricious in imposing the measure of penalty or discipline involved in said determinations.

Objection In Point of Law

THIRTEENTH: That the petition herein fails to allege facts sufficient to constitute a legal basis for the relief requested, or for any relief.

FOURTEENTH: That the aforesaid hearings were held pursuant to statutory direction, to wit, section 119 of the Alcoholic Beverage Control Law, and the petitioner having raised a question as to whether the respondent Authority's determinations are, on the entire record, supported by substantial evidence, this proceeding must be transferred to the Appellate Division, First Judicial Department, for determination in the first instance pursuant to the provisions of sections 7803, subdivision 4 and 7804(g) of the Civil Practice Law and Rules.

Answer

WHEREFORE, the respondent State Liquor Authority respectfully prays that this proceeding be transferred to the Appellate Division, First Judicial Department, for determination in the first instance pursuant to the provisions of sections 7803, subdivision 4 and 7804(g) of the Civil Practice Law and Rules, and upon such transfer the determinations of the respondent Authority be confirmed in all respects and the petition dismissed, with costs.

STANLEY STEIN
Acting Counsel, State Liquor Authority
Attorney for Respondent
Office & P. O. Address
Room 1820
250 Broadway
New York, New York 10007
Telephone: (212) 587-4147

Answer

STATE OF NEW YORK)
 COUNTY OF NEW YORK) ss.:

BARBARA JOANNI LORD, being duly-sworn, deposes and says:

That she is Secretary to the State Liquor Authority of the State of New York, the respondent in the within proceeding; that she has read and knows the contents of the foregoing answer; that she is acquainted with the facts therein alleged; that the same are true to her own knowledge or are based upon official records made available to her, except as to matters therein stated to be alleged on information and belief; and that as to those matters, she believes them to be true.

/s/ BARBARA JOANNI LORD
 BARBARA JOANNI LORD

Sworn to before-me this
 22nd day of June, 1982

/s/ STANLEY STEIN
 STANLEY STEIN
 Notary Public, State of New York
 No. 43-4675792
 Qualified in Richmond County
 Commission Expires March 30, 1984

Exhibit 1—Renewal Stipulation (1981-1982)

STATE OF NEW YORK
 LIQUOR AUTHORITY

In the Matter of Renewal of the
 Wholesale Liquor License
 Issued to Brown Forman Distillers Corporation
 For Premises Located at One North Broadway,
 White Plains, N.Y.

Serial No. SLL 1009 for License Period 1981-1982

RENEWAL STIPULATION

WHEREAS, the captioned licensee (hereinafter referred to as the Licensee) has filed or is about to file with the New York State Liquor Authority (hereinafter referred to as the Authority) an application to renew the license heretofore issued to the licensee by the Authority; and

WHEREAS, for good and sufficient reasons the Authority is unable to examine fully and review adequately the renewal application prior to the commencement of the licensed period for which the renewal license is sought or may be unable to initiate or conclude a revocation proceeding prior to the commencement of the above license period and

WHEREAS, the licensee represents that it would create undue hardship were the Authority to withhold the is-

Exhibit 1—Renewal Stipulation (1981-1982)

suance of the renewal license pending the completion of the necessary investigation and evaluation of the renewal application or the initiation of a revocation proceeding on the determination of such a proceeding.

NOW, THEREFORE, IT IS STIPULATED AND AGREED by and between the licensee and the Authority that the Authority will issue to the licensee a license for the above license period only on the following conditions:

1. That any and all rights of the Authority to institute or complete revocation or other disciplinary proceedings which the Authority possessed during the current license period be and are carried over to the following license period and that the renewal of said license shall be without prejudice to the right of the Authority to revoke, cancel or suspend said renewal license, for causes, violations or offenses upon which the Authority could have or has already instituted revocation proceedings during the current license period.

2. That the Authority is authorized to complete revocation or other disciplinary proceedings for causes, violations or offenses committed during any prior license period which proceedings have already been commenced, and the renewal of said license shall be without prejudice to the right of the Authority to revoke, cancel or suspend said renewal license for said causes, violations or offenses committed during any prior license period upon which proceedings have been commenced and the licensee expressly waives its rights to interpose or allege any defense it might

Exhibit 1—Renewal Stipulation (1981-1982)

have by virtue of Sec. 118 of the Alcoholic Beverage Control Law.

3. That the issuance of the renewal license shall not be deemed a waiver by the Authority of any cause to revoke, cancel or suspend the said license which the Authority now possesses, nor shall it be deemed a waiver by the Authority of any reason for refusal to issue said renewal license.

4. That in the event that the Authority shall, subsequent to the issuance of the said renewal license, determine that the license should not have been renewed, then the Authority shall:

- (a) By registered or certified mail or personal service, serve upon the licensee a "Notice of Contemplated Recall" at any time during the renewed license period.
- (b) The Notice of Contemplated Recall shall set forth the reasons with specifications wherever possible, upon which the recall is predicated.
- (c) Except as hereinafter set forth in subdivision (e) hereof the Notice of Contemplated Recall shall provide for a recall interview at a time and place to be fixed by the Authority.
- (d) If the Authority shall determine to recall the said license, it shall issue to the licensee an Order of Recall, said Order of Recall shall require the surrender of the said license to the Authority on a date to be specified by the Authority in the Order of Recall. On the date required for surrender, the license shall become null and void and may thereafter be physically possessed by any peace officer or a representative of the Authority.

Exhibit 1—Renewal Stipulation (1981-1982)

- (e) However, if the Authority has heretofore served a Notice of Contemplated Non-renewal or Contemplated Disapproval of Renewal, and/or has held an interview thereon, but has not made a final determination thereof, it is agreed and stipulated that such Notice of Contemplated Non-renewal or Disapproval and all proceedings had in connection therewith shall be deemed to carry over into and constitute a Notice of Contemplated Recall. In such event any determination by the Authority to recall such renewal license may be made solely upon the proceedings held in connection with the Notice of Contemplated Non-renewal or of Contemplated Disapproval or upon such further proceedings as the Authority in its discretion elects to hold. If the Authority determines to recall the license hereunder, the repossession of such license shall be made in the manner set forth in subdivision (d) hereof.

5. The recall of a license pursuant to Paragraph 3 above, shall be deemed the same as a refusal to renew said license in the first instance and accordingly subject to review under Section 121 of the Alcoholic Beverage Control Law, provided, however, that in any proceedings to review the recall of said license, the licensee shall not be entitled to allege that the issuance of said license constituted a waiver by the Authority of the grounds upon which the recall is based, nor shall the licensee be entitled to allege that the Authority issued said license with knowledge or notice of the facts stated in the application to renew the license, but rather, it is expressly understood and agreed that in issuing the said license the Authority has specifically

Exhibit 1—Renewal Stipulation (1981-1982)

reserved to itself the right to recall the license as herein above stated.

6. The words licensee or license wheresoever they may appear herein shall be deemed to include the words permittee or permit in any appropriate case.

THE STATE LIQUOR AUTHORITY

Brown-Forman Distillers Corporation

LICENSEE

/s/ BENJAMIN H. MORRIS

FOR THE LICENSEE

Benjamin H. Morris, Vice President

Dated: March 2, 1981

STIPULATION REQUIRED BECAUSE: investigation pending

Exhibit 1—Renewal Stipulation (1981-1982)

BOND IN SUPPORT OF APPLICATION FOR LICENSE OR PERMIT
UNDER THE NEW YORK ALCOHOLIC BEVERAGE CONTROL LAW
ST. PAUL FIRE AND MARINE INSURANCE COMPANY

Application Number

This bond expires in February 28, 1982

Penal Sum of Bond \$20,000 Plus Costs

KNOW ALL MEN BY THESE PRESENTS, that we,

Name of Applicant

Brown-Forman Distillers Corporation

Address of Place of Business

of 1 North Broadway, South Tower Bldg.

White Plains, N.Y. 10601

in the county of Westchester, State of New York, as Principal, and the ST. PAUL FIRE AND MARINE INSURANCE COMPANY having an office and usual place of business in the City of New York, State of New York, a surety company approved by the Superintendent of Insurance of New York State as to solvency and responsibility and authorized to transact business in New York State, as Surety, are held and firmly bound unto the People of the State of New York

Exhibit 1—Renewal Stipulation (1981-1982)

in the penal sum set forth above and for the payment of any costs taxed or allowed in any action or proceeding to the extent of One Thousand Dollars (\$1000.00) for the payment of which sum or sums, well and truly to be made, we, the said principal and surety, bind ourselves, successors, and assigns, respectively, jointly and severally, firmly by these presents.

WHEREAS, the above bounden principal is making application to the New York State Liquor Authority, for a license or permit under the Alcoholic Beverage Control Law and the said State Liquor Authority, by Part 81 of Subtitle B of Title 9 of the Official Compilation of the Codes, Rules and Regulations of the State of New York (Rule 9 to the Rules of the Authority), having required the principal to file with it a bond to the People of the State of New York, as provided in said Law aforesaid.

Now, THEREFORE, the conditions of this obligation are such that if the said license or permit applied for, which expires on the date designated in said license or permit, is granted to the said principal and the principal will not, during the license or permit period, suffer or permit any violation of the provisions of the Alcoholic Beverage Control Law, or of any of the rules now or hereafter issued by said State Liquor Authority, or give cause, as provided in the Alcoholic Beverage Control Law or Part 53 of Subtitle B of Title 9 of the Official Compilation of the Codes, Rules and Regulations of the State of New York (Rule 36 of the Rules of the State Liquor Authority), for the cancellation, revocation or suspension of said license or permit or the issuance of an order of warning, and will pay all fines and penalties which shall accrue thereunder, together with all

Exhibit 1—Renewal Stipulation (1981-1982)

costs taxed or allowed in any action or proceeding brought or instituted for a violation of any of the provisions of said Alcoholic Beverage Control Law, or of any of the rules now or hereafter issued by said State Liquor Authority, or for cause for the cancellation, revocation or suspension or issuance of an order of warning as provided in the Alcoholic Beverage Control Law or Rules of the Authority, or costs taxed or allowed in any review pursuant to Section 121 of the Alcoholic Beverage Control Law, then this obligation shall be void, otherwise to remain in full force and effect, subject, however, to the following conditions:

1. An action for the breach of any condition of this bond may be maintained without previous conviction or prosecution for the violation of any provision of said Alcoholic Beverage Control Law, or of any of the rules now or hereafter issued by the State Liquor Authority, or for cause as provided by the Alcoholic Beverage Control Law or Part 53 of Subtitle B of Title 9 of the Official Compilation of the Codes, Rules and Regulations of the State of New York (Rule 36 of the Rules of the Authority).

2. The aggregate liability of the surety on account of any and all defaults hereunder shall in no event exceed the penal sum of this bond plus costs taxed or allowed in any action or proceeding to the extent of One Thousand Dollars (\$1000.00).

3. Upon the payment of any loss arising under this bond, the surety shall be subrogated to the rights and remedies of the obligee against the principal to recover from the principal any amount so paid.

4. Any action brought for the penal sum of this bond shall be commenced within twenty-four months

Exhibit 1—Renewal Stipulation (1981-1982)

after the expiration of the license or permit period aforementioned, or for costs within one year after final disposition of any action or proceeding. In the event of the institution of any action or proceeding to review the Authority's determination, the period of 24 months shall not commence until the final determination of the proceeding or litigation.

5. This bond shall be effective during the time the aforementioned license or permit shall be in effect and during any extension thereof.

6. A breach of any condition of this bond shall be deemed to have been established by the revocation, cancellation or suspension of the aforesaid license or permit or the issuance of an order of warning by the State Liquor Authority unless said revocation, cancellation, suspension or order of warning shall have been reversed or annulled by a Court of competent jurisdiction.

7. In any action or proceeding to recover on this bond, the principal and the company named herein as Surety waive any defense based upon any defect in the bond, including, but not limited to, an erroneous, improper or defective insertion or omission to insert or **apparent** alteration of the expiration year and/or amount of the penal sum of the bond and further waive any objection that the bond bears a printed, typewritten or facsimile signature. Any bond filed with the State Liquor Authority shall be admissible in evidence in any court on application of the State Liquor Authority or People of the State of New York without further proof of due execution thereof by or on behalf of the principal and surety and shall be conclusively presumed to have been duly executed by and on behalf of the principal and surety. Any bond filed with the State

Exhibit 1—Renewal Stipulation (1981-1982)

Liquor Authority and bearing the printed or facsimile name of the surety or the typewritten or facsimile signature of its representative shall be conclusively presumed to be the duly issued bond of the surety company and binding on it, its successors and assigns for the amount specified in Part 81 of Subtitle B of Title 9 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Rule 9 of the Rules of the State Liquor Authority).

IN WITNESS WHEREOF the parties hereto have caused these presents to be signed and sealed this 5th day of December, 1981.

BROWN-FORMAN DISTILLERS	ST. PAUL FIRE AND MARINE
CORP., L.S.	INSURANCE COMPANY
Principal	Surety

By:

By: (Illegible)

Exhibit 1—Renewal Stipulation (1981-1982)

STATE OF NEW YORK

LIQUOR AUTHORITY

In the Matter of Renewal of the
Wholesale Liquor License

Issued to Brown Forman Dist. Corp.

For Premises Located at 555 Madison Ave.,
11th Floor

Serial No. LLL 585 for License Period 1981-1982.

RENEWAL STIPULATION

WHEREAS, the captioned licensee (hereinafter referred to as the Licensee) has filed or is about to file with the New York State Liquor Authority (hereinafter referred to as the Authority) an application to renew the license heretofore issued to the licensee by the Authority; and

WHEREAS, for good and sufficient reasons the Authority is unable to examine fully and review adequately the renewal application prior to the commencement of the licensed period for which the renewal license is sought or may be unable to initiate or conclude a revocation proceeding prior to the commencement of the above license period and

WHEREAS, the licensee represents that it would create undue hardship were the Authority to withhold the issuance

Exhibit 1—Renewal Stipulation (1981-1982)

of the renewal license pending the completion of the necessary investigation and evaluation of the renewal application or the initiation of a revocation proceeding on the determination of such a proceeding.

NOW, THEREFORE, IT IS STIPULATED AND AGREED by and between the licensee and the Authority that the Authority will issue to the licensee a license for the above license period only on the following conditions:

1. That any and all rights of the Authority to institute or complete revocation or other disciplinary proceedings which the Authority possessed during the current license period be and are carried over to the following license period and that the renewal of said license shall be without prejudice to the right of the Authority to revoke, cancel or suspend said renewal license, for causes, violations or offenses upon which the Authority could have already instituted revocation proceedings during the current license period.

2. That the Authority is authorized to complete revocation or other disciplinary proceedings for causes, violations or offenses committed during any prior license period which proceedings have already been commenced, and the renewal of said license shall be without prejudice to the right of the Authority to revoke, cancel or suspend said renewal license for said causes, violations or offenses committed during any prior license period upon which proceedings have been commenced and the licensee expressly waives its

Exhibit 1—Renewal Stipulation (1981-1982)

rights to interpose or allege any defense it might have by virtue of Sec. 118 of the Alcoholic Beverage Control Law.

3. That the issuance of the renewal shall not be deemed a waiver by the Authority of any cause to revoke, cancel or suspend the said license which the Authority now possesses, nor shall it be deemed a waiver by the Authority of any reason for refusal to issue said renewal license.

4. That in the event that the Authority shall, subsequent to the issuance of the said renewal license, determine that the license should not have been renewed, then the Authority shall:

- (a) By registered or certified mail or personal service, serve upon the licensee a "Notice of Contemplated Recall" at any time during the renewed license period.
- (b) The Notice of Contemplated Recall shall set forth the reasons with specifications wherever possible, upon which the recall is predicated.
- (c) Except as hereinafter set forth in subdivision (e) hereof the Notice of Contemplated Recall shall provide for a recall interview at a time and place to be fixed by the Authority.
- (d) If the Authority shall determine to recall the said license, it shall issue to the licensee an Order of Recall, said Order of Recall shall require the surrender of the said license to the Authority on a date to be specified by the Authority in the Order of Recall. On the date required for surrender, the license shall become null and void and may

Exhibit 1—Renewal Stipulation (1981-1982)

thereafter be physically possessed by any peace officer or a representative of the Authority.

- (e) However, if the Authority has heretofore served a Notice of Contemplated Non-renewal or Contemplated Disapproval of Renewal, and/or has held an interview thereon, but has not made a final determination thereof, it is agreed and stipulated that such Notice of Contemplated Non-renewal or Disapproval and all proceedings had in connection therewith shall be deemed to carry over into and constitute a Notice of Contemplated Recall. In such event any determination by the Authority to recall such renewal license may be made solely upon the proceedings held in connection with the Notice of Contemplated Non-renewal or of Contemplated Disapproval or upon such further proceedings as the Authority in its discretion elects to hold. If the Authority determines to recall the license hereunder, the repossession of such license shall be made in the manner set forth in subdivision (d) hereof.

5. The recall of a license pursuant to Paragraph 3 above, shall be deemed the same as a refusal to renew said license in the first instance and accordingly subject to review under Section 121 of the Alcoholic Beverage Control Law, provided, however, that in any proceedings to review the recall of said license, the licensee shall not be entitled to allege that the issuance of said license constituted a waiver by the Authority of the group upon which the recall is based, nor shall the licensee be entitled to allege that the Authority issued said license with knowledge or notice of the facts stated in the application to renew the license,

Exhibit 1—Renewal Stipulation (1981-1982)

but rather, it is expressly understood and agreed that in issuing the said license the Authority has specifically reserved to itself the right to recall the license as herein above stated.

6. The words licensee or license wheresoever they may appear herein shall be deemed to include the words permittee or permit in any appropriate case.

THE STATE LIQUOR AUTHORITY

BROWN-FORMAN DISTILLERS CORPORATION

Licensee

/s/ BENJAMIN H. MORRIS

For the Licensee
BENJAMIN H. MORRIS
Vice President

Dated: February 27, 1981

STIPULATION REQUIRED BECAUSE: investigation pending.

Exhibit 1—Renewal Stipulation (1981-1982)

BOND IN SUPPORT OF APPLICATION FOR LICENSE OR PERMIT
UNDER THE NEW YORK ALCOHOLIC BEVERAGE CONTROL LAW

ST. PAUL FIRE AND MARINE INSURANCE COMPANY

Application Number

This bond expires in February 28, 1982.

Penal Sum of Bond \$20,000 Plus Costs.

KNOW ALL MEN BY THESE PRESENTS, that we

Name of Applicant

The Joseph Garneau Co., A Division
of Brown-Forman Distillers Corp.

Address of Place of Business

555 Madison Ave. of New York, NY

in the county of New York, State of New York, as Principal, and the ST. PAUL FIRE AND MARINE INSURANCE COMPANY having an office and usual place of business in the City of New York, State of New York, a surety company approved by the Superintendent of Insurance of New York State as to solvency and responsibility and authorized to transact business in New York State, as Surety, are held and firmly bound unto the People of the State of New York in the penal sum set forth above and for the payment of any costs taxed or allowed in any action or proceeding to the extent of One Thousand Dollars (\$1000.00) for the payment of which sum or sums, well and truly to be made, we, the said principal and surety, bind ourselves, successors,

Exhibit 1—Renewal Stipulation (1981-1982)

and assigns, respectively, jointly and severally, firmly by these presents.

WHEREAS, the above bounden principal is making application to the New York State Liquor Authority, for a license or permit under the Alcoholic Beverage Control Law and the said State Liquor Authority, by Part 81 of Subtitle B of Title 9 of the Official Compilation of the Codes, Rules and Regulations of the State of New York (Rule 9 of the Rules of the Authority), having required the principal to file with it a bond to the People of the State of New York, as provided in said Law aforesaid.

Now, THEREFORE, the conditions of this obligation are such that if the said license or permit applied for, which expires on the date designated in said license or permit, is granted to the said principal and the principal will not, during the license or permit period, suffer or permit any violation of the provisions of the Alcoholic Beverage Control Law, or of any of the rules now or hereafter issued by said State Liquor Authority, or give cause, as provided in the Alcoholic Beverage Control Law or Part 53 of Subtitle B of Title 9 of the Official Compilation of the Codes, Rules and Regulations of the State of New York (Rule 36 of the Rules of the State Liquor Authority), for the cancellation, revocation or suspension of said license or permit or the issuance of an order of warning, and will pay all fines and penalties which shall accrue thereunder, together with all costs taxed or allowed in any action or proceeding brought or instituted for a violation of any of the provisions of said Alcoholic Beverage Control Law, or of any of the rules now or hereinafter issued by said State Liquor

Exhibit 1—Renewal Stipulation (1981-1982)

Authority, or for cause for the cancellation, revocation or suspension or issuance of an order of warning as provided in the Alcoholic Beverage Control Law or Rules of the Authority, or costs taxed or allowed in any review pursuant to Section 121 of the Alcoholic Beverage Control Law, then this obligation shall be void; otherwise to remain in full force and effect; subject, however, to the following conditions:

1. An action for the breach of any condition of this bond may be maintained without previous conviction or prosecution for the violation of any provision of said Alcoholic Beverage Control Law, or of any of the rules now or hereafter issued by the State Liquor Authority, or for cause as provided by the Alcoholic Beverage Control Law or Part 53 of Subtitle B of Title 9 of the Official Compilation of the Codes, Rules and Regulations of the State of New York (Rule 36 of the Rules of the Authority).
2. The aggregate liability of the surety on account of any and all defaults hereunder shall in no event exceed the penal sum of this bond plus costs taxed or allowed in any action or proceeding to the extent of One Thousand Dollars (\$1000.00).
3. Upon the payment of any loss arising under this bond, the surety shall be subrogated to the rights and remedies of the obligee against the principal to recover from the principal any amount so paid.
4. Any action brought for the penal sum of this bond shall be commenced within twenty-four months after the expiration of the license or permit period aforementioned, or for costs within one year after final disposition of any action or proceeding. In

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the event of the institution of any action or proceeding to review the Authority's determination, the period of 24 months shall not commence until the final determination of the proceeding or litigation.

5. This bond shall be effective during the time the aforementioned license or permit shall be in effect and during any extension thereof.
6. A breach of any condition of this bond shall be deemed to have been established by the revocation, cancellation or suspension of the aforesaid license or permit or the issuance of an order of warning by the State Liquor Authority unless said revocation, cancellation, suspension or order of warning shall have been reversed or annulled by a Court of competent jurisdiction.
7. In any action or proceeding to recover on this bond, the principal and the company named herein as Surety waive any defense based upon any defect in the bond, including, but not limited to, an erroneous, improper or defective insertion or omission to insert or apparent alteration of the expiration year and/or amount of the penal sum of the bond and further waive any objection that the bond bears a printed, typewritten or facsimile signature. Any bond filed with the State Liquor Authority shall be admissible in evidence in any court on application of the State Liquor Authority or People of the State of New York without further proof of due execution thereof by or on behalf of the principal and surety and shall be conclusively presumed to have been duly executed by and on behalf of the principal and surety. Any bond filed with the State Liquor Authority and bearing the printed or facsimile name of the surety or the typewritten or

Exhibit 1--Renewal Stipulation (1981-1982)

facsimile signature of its representative shall be conclusively presumed to be the duly issued bond of the surety company and binding on it, its successors and assigns for the amount specified in Part 81 of Subtitle B of Title 9 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Rule 9 of the Rules of the State Liquor Authority).

IN WITNESS WHEREOF the parties hereto have caused these presents to be signed and sealed this 5th day of January, 1981.

THE JOSEPH GARNEAU CO.,
A Division of BROWN-FORMAN
DISTILLERS CORP., L.S.
Principal

ST. PAUL FIRE AND
MARINE INSURANCE
COMPANY
Surety

By:

By: /s/ DONALD HOLDIN
DONALD HOLDIN
Attorney-in-fact

Exhibit 1—Renewal Stipulation (1982-1983)

STATE OF NEW YORK

LIQUOR AUTHORITY

In the Matter of Renewal of the
WHOLESALE LIQUOR LICENSE

Issued to BROWN FORMAN DISTILLERS CORPORATION

For Premises Located at
1 NORTH BDWY., WHITE PLAINS, N.Y. 10601

Serial No. 8 LL 1009 for License Period 1982-83

RENEWAL STIPULATION

WHEREAS, the captioned licensee (hereinafter referred to as the Licensee) has filed or is about to file with the New York State Liquor Authority (hereinafter referred to as the Authority) an application to renew the license heretofore issued to the licensee by the Authority; and

WHEREAS, for good and sufficient reasons the Authority is unable to examine fully and review adequately the renewal application prior to the commencement of the licensed period for which the renewal license is sought or may be unable to initiate or conclude a revocation proceeding prior to the commencement of the above license period and

WHEREAS, the licensee represents that it would create undue hardship were the Authority to withhold the issuance of the renewal license pending the completion of the necessary investigation and evaluation of the renewal application or the initiation of a revocation proceeding on the determination of such a proceeding.

Exhibit 1—Renewal Stipulation (1982-1983)

NOW, THEREFORE, IT IS STIPULATED AND AGREED by and between the licensee and the Authority that the Authority will issue to the licensee a license for the above license period only on the following conditions:

1. That any and all rights of the Authority to institute or complete revocation or other disciplinary proceedings which the Authority possessed during the current license period be and are carried over to the following license period and that the renewal of said license shall be without prejudice to the right of the Authority to revoke, cancel or suspend said renewal license, for causes, violations or offenses upon which the Authority could have or has already instituted revocation proceedings during the current license period.

2. That the Authority is authorized to complete revocation or other disciplinary proceedings for causes, violations or offenses committed during any prior license period which proceedings have already been commenced, and the renewal of said license shall be without prejudice to the right of the Authority to revoke, cancel or suspend said renewal license for said causes, violations or offenses committed during any prior license period upon which proceedings have been commenced and the licensee expressly waives its rights to interpose or allege any defense it might have by virtue of Sec. 118 of the Alcoholic Beverage Control Law.

3. That the issuance of the renewal license shall not be deemed a waiver by the Authority of any cause to revoke, cancel or suspend the said license which the Authority now possesses, nor shall it be deemed a waiver by the Authority of any reason for refusal to issue said renewal license.

Exhibit 1—Renewal Stipulation (1982-1983)

4. That in the event that the Authority shall, subsequent to the issuance of the said renewal license, determine that the license should not have been renewed, then the Authority shall:

- (a) By registered or certified mail or personal service, serve upon the licensee a "Notice of Contemplated Recall" at any time during the renewed license period.
- (b) The Notice of Contemplated Recall shall set forth the reasons with specifications wherever possible, upon which the recall is predicated.
- (c) Except as hereinafter set forth in subdivision (e) hereof the Notice of Contemplated Recall shall provide for a recall interview at a time and place to be fixed by the Authority.
- (d) If the Authority shall determine to recall the said license, it shall issue to the licensee an Order of Recall, said Order of Recall shall require the surrender of the said license to the Authority on a date to be specified by the Authority in the Order of Recall. On the date required for surrender, the license shall become null and void and may thereafter be physically possessed by any peace officer or a representative of the Authority.
- (e) However, if the Authority has heretofore served a Notice of Contemplated Non-renewal or Contemplated Disapproval of Renewal, and/or has held an interview thereon, but has not made a final determination thereof, it is agreed and stipulated that such Notice of Contemplated Non-renewal or Disapproval and all proceedings had in connection therewith shall be deemed to carry over into and constitute a Notice of Contemplated Recall. In such event any determination by the Authority to recall such renewal license may be made solely upon the proceedings held in connection with the

Exhibit 1—Renewal Stipulation (1982-1983)

Notice of Contemplated Non-renewal or of Contemplated Disapproval or upon such further proceedings as the Authority in its discretion elects to hold. If the Authority determines to recall the license hereunder, the repossession of such license shall be made in the manner set forth in subdivision (d) hereof.

5. The recall of a license pursuant to Paragraph 3 above, shall be deemed the same as a refusal to renew said license in the first instance and accordingly subject to review under Section 121 of the Alcoholic Beverage Control Law, provided, however, that in any proceedings to review the recall of said license, the licensee shall not be entitled to allege that the issuance of said license constituted a waiver by the Authority of the grounds upon which the recall is based, nor shall the licensee be entitled to allege that the Authority issued said license with knowledge or notice of the facts stated in the application to renew the license, but rather, it is expressly understood and agreed that in issuing the said license the Authority has specifically reserved to itself the right to recall the license as herein above stated.

6. The words licensee or license wheresoever they may appear herein shall be deemed to include the words permittee or permit in any appropriate case.

THE STATE LIQUOR AUTHORITY

LICENSEE

(Illegible)

FOR THE LICENSEE

Dated: March 1, 1982

STIPULATION REQUIRED BECAUSE:

Exhibit 1—Renewal Stipulation (1982-1983)

BOND IN SUPPORT OF APPLICATION FOR LICENSE OR PERMIT
UNDER THE NEW YORK ALCOHOLIC BEVERAGE CONTROL LAW
ST. PAUL FIRE AND MARINE INSURANCE COMPANY

Application Number

This bond expires in 2-28-83.

Penal Sum of Bond, \$20,000 Plus Costs.

KNOW ALL MEN BY THESE PRESENTS, that we

Name of Applicant

BROWN-FORMAN DISTILLERS

Address of Place of Business

of 1 N. Broadway, South Tower Bldg.,
White Plains, N.Y. 10601

in the county of Westchester State of New York, as Principal, and the ST. PAUL FIRE AND MARINE INSURANCE COMPANY having an office and usual place of business in the City of New York, State of New York, a surety company approved by the Superintendent of Insurance of New York State as to solvency and responsibility and authorized to transact business in New York State, as Surety, are held and firmly bound unto the People of the State of New York in the penal sum set forth above and for the payment of any costs taxed or allowed in any action or proceeding to the extent of One Thousand Dollars (\$1000.00) for the payment of which sum or sums, well and truly to be made, we, the said principal and surety, bind ourselves, succes-

Exhibit 1—Renewal Stipulation (1982-1983)

sors, and assigns, respectively, jointly and severally, firmly by these presents.

WHEREAS, the above bounden principal is making application to the New York State Liquor Authority, for a license or permit under the Alcoholic Beverage Control Law and the said State Liquor Authority, by Part 81 of Subtitle B of Title 9 of the Official Compilation of the Codes, Rules and Regulations of the State of New York (Rule 9 of the Rules of the Authority), having required the principal to file with it a bond to the People of the State of New York, as provided in said Law aforesaid.

NOW, THEREFORE, the conditions of this obligation are such that if the said license or permit applied for, which expires on the date designated in said license or permit, is granted to the said principal and the principal will not, during the license or permit period, suffer or permit any violation of the provisions of the Alcoholic Beverage Control Law, or of any of the rules now or hereafter issued by said State Liquor Authority, or give cause, as provided in the Alcoholic Beverage Control Law or Part 53 of Subtitle B of Title 9 of the Official Compilation of the Codes, Rules and Regulations of the State of New York (Rule 36 of the Rules of the State Liquor Authority), for the cancellation, revocation or suspension of said license or permit or the issuance of an order of warning, and will pay all fines and penalties which shall accrue thereunder, together with all costs taxed or allowed in any action or proceeding brought or instituted for a violation of any of the provisions of said Alcoholic Beverage Control Law, or of any of the rules now or hereafter issued by said State Liquor Authority,

Exhibit 1—Renewal Stipulation (1982-1983)

or for cause for the cancellation, revocation or suspension or issuance of an order of warning as provided in the Alcoholic Beverage Control Law or Rules of the Authority, or costs taxed or allowed in any review pursuant to Section 121 of the Alcoholic Beverage Control Law, then this obligation shall be void; otherwise to remain in full force and effect, subject, however, to the following conditions:

1. An action for the breach of any condition of this bond may be maintained without previous conviction or prosecution for the violation of any provision of said Alcoholic Beverage Control Law, or of any of the rules now or hereafter issued by the State Liquor Authority, or for cause as provided by the Alcoholic Beverage Control Law or Part 53 of Subtitle B of Title 9 of the Official Compilation of the Codes, Rules and Regulations of the State of New York (Rule 36 of the Rules of the Authority).
2. The aggregate liability of the surety on account of any and all defaults hereunder shall in no event exceed the penal sum of this bond plus costs taxed or allowed in any action or proceeding to the extent of One Thousand Dollars (\$1000.00).
3. Upon the payment of any loss arising under this bond, the surety shall be subrogated to the rights and remedies of the obligee against the principal to recover from the principal any amount so paid.
4. Any action brought for the penal sum of this bond shall be commenced within twenty-four months after the expiration of the license or permit period aforementioned, or for costs within one year after final disposition of any action or proceeding. In the event of the institution of any action or pro-

Exhibit 1—Renewal Stipulation (1982-1983)

ceeding to review the Authority's determination, the period of 24 months shall not commence until the final determination of the proceeding or litigation.

5. This bond shall be effective during the time the aforementioned license or permit shall be in effect and during any extension thereof.
6. A breach of any condition of this bond shall be deemed to have been established by the revocation, cancellation or suspension of the aforesaid license or permit or the issuance of an order of warning by the State Liquor Authority unless said revocation, cancellation, suspension or order of warning shall have been reversed or annulled by a Court of competent jurisdiction.
7. In any action or proceeding to recover on this bond, the principal and the company named herein as Surety waive any defense based upon any defect in the bond, including, but not limited to, an erroneous, improper or defective insertion or omission to insert or apparent alteration of the expiration year and/or amount of the penal sum of the bond and further waive any objection that the bond bears a printed, typewritten or facsimile signature. Any bond filed with the State Liquor Authority shall be admissible in evidence in any court on application of the State Liquor Authority or People of the State of New York without further proof of due execution thereof by or on behalf of the principal and surety and shall be conclusively presumed to have been duly executed by and on behalf of the principal and surety. Any bond filed with the State Liquor Authority and bearing the printed or facsimile name of the surety or the typewritten or

Exhibit 1—Renewal Stipulation (1982-1983)

facsimile signature of its representative shall be conclusively presumed to be the duly issued bond of the surety company and binding on it, its successors and assigns for the amount specified in Part 81 of Subtitle B of Title 9 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Rule 9 of the Rules of the State Liquor Authority).

IN WITNESS WHEREOF the parties hereto have caused these presents to be signed and sealed this 14th day of December, 1981.

BROWN-FORMAN DISTILLERS
CORP., L.S.
Principal

ST. PAUL FIRE AND
MARINE INSURANCE
COMPANY
Surety

By:

By: /s/ DONALD HOLDIN
DONALD HOLDIN
Attorney-in-fact

Exhibit 1—Renewal Stipulation (1982-1983)

STATE OF NEW YORK

LIQUOR AUTHORITY

In the Matter of Renewal of the
WHOLESALE LIQUOR LICENSE

Issued to BROWN FORMAN DISTILLER CORP.

For Premises Located at
555 MADISON AVE. 11TH FL. N.Y., N.Y. 10022

Serial No. LLL 585 for License Period 1982-1983

RENEWAL STIPULATION

WHEREAS, the captioned licensee (hereinafter referred to as the Licensee) has filed or is about to file with the New York State Liquor Authority (hereinafter referred to as the Authority) an application to renew the license heretofore issued to the licensee by the Authority; and

WHEREAS, for good and sufficient reasons the Authority is unable to examine fully and review adequately the renewal application prior to the commencement of the licensed period for which the renewal license is sought or may be unable to initiate or conclude a revocation proceeding prior to the commencement of the above license period and

WHEREAS, the licensee represents that it would create undue hardship were the Authority to withhold the is-

Exhibit 1—Renewal Stipulation (1982-1983)

suance of the renewal license pending the completion of the necessary investigation and evaluation of the renewal application or the initiation of a revocation proceeding on the determination of such a proceeding.

NOW, THEREFORE, IT IS STIPULATED AND AGREED by and between the licensee and the Authority that the Authority will issue to the licensee a license for the above license period only on the following conditions:

1. That any and all rights of the Authority to institute or complete revocation or other disciplinary proceedings which the Authority possessed during the current license period be and are carried over to the following license period and that the renewal of said license shall be without prejudice to the right of the Authority to revoke, cancel or suspend said renewal license, for causes, violations or offenses upon which the Authority could have or has already instituted revocation proceedings during the current license period.

2. That the Authority is authorized to complete revocation or other disciplinary proceedings for causes, violations or offenses committed during any prior license period which proceedings have already been commenced, and the renewal of said license shall be without prejudice to the right of the Authority to revoke, cancel or suspend said renewal license for said causes, violations or offenses committed during any prior license period upon which proceedings have been commenced and the licensee expressly waives its rights to interpose or allege any defense it might

Exhibit 1—Renewal Stipulation (1982-1983)

have by virtue of Sec. 118 of the Alcoholic Beverage Control Law.

3. That the issuance of the renewal license shall not be deemed a waiver by the Authority of any cause to revoke, cancel or suspend the said license which the Authority now possesses, nor shall it be deemed a waiver by the Authority of any reason for refusal to issue said renewal license.

4. That in the event that the Authority shall, subsequent to the issuance of the said renewal license, determine that the license should not have been renewed, then the Authority shall:

- (a) By registered or certified mail or personal service, serve upon the licensee a "Notice of Contemplated Recall" at any time during the renewed license period.
- (b) The Notice of Contemplated Recall shall set forth the reasons with specifications wherever possible, upon which the recall is predicated.
- (c) Except as hereinafter set forth in subdivision (e) hereof the Notice of Contemplated Recall shall provide for a recall interview at a time and place to be fixed by the Authority.
- (d) If the Authority shall determine to recall the said license, it shall issue to the licensee an Order of Recall, said Order of Recall shall require the surrender of the said license to the Authority on a date to be specified by the Authority in the Order of Recall. On the date required for surrender, the license shall become null and void and may there-

Exhibit 1—Renewal Stipulation (1982-1983)

after be physically possessed by any peace officer or a representative of the Authority.

- (e) However, if the Authority has heretofore served a Notice of Contemplated Non-renewal or Contemplated Disapproval of Renewal, and/or has held an interview thereon, but has not made a final determination thereof, it is agreed and stipulated that such Notice of Contemplated Non-renewal or Disapproval and all proceedings had in connection therewith shall be deemed to carry over into and constitute a Notice of Contemplated Recall. In such event any determination by the Authority to recall such renewal license may be made solely upon the proceedings held in connection with the Notice of Contemplated Non-renewal or of Contemplated Disapproval or upon such further proceedings as the Authority in its discretion elects to hold. If the Authority determines to recall the license hereunder, the repossession of such license shall be made in the manner set forth in subdivision (d) hereof.

5. The recall of a license pursuant to Paragraph 3 above, shall be deemed the same as a refusal to renew said license in the first instance and accordingly subject to review under Section 121 of the Alcoholic Beverage Control Law, provided, however, that in any proceedings to review the recall of said license, the licensee shall not be entitled to allege that the issuance of said license constituted a waiver by the Authority of the grounds upon which the recall is based, nor shall the licensee be entitled to allege that the Authority issued said license with knowledge or notice of the facts stated in the application to renew the

Exhibit 1—Renewal Stipulation (1982-1983)

license, but rather, it is expressly understood and agreed that in issuing the said license the Authority has specifically reserved to itself the right to recall the license as herein above stated.

6. The words licensee or license wheresover they may appear herein shall be deemed to include the words permittee or permit in any appropriate case.

THE STATE LIQUOR AUTHORITY

BROWN-FORMAN DISTILLERS CORPORATION

LICENSEE

(Illegible)

FOR THE LICENSEE
Assistant Secretary

Dated: _____, 19_____

STIPULATION REQUIRED BECAUSE: _____

Exhibit 1—Renewal Stipulation (1982-1983)

BOND IN SUPPORT OF APPLICATION FOR LICENSE OR PERMIT
UNDER THE NEW YORK ALCOHOLIC BEVERAGE CONTROL LAW
ST. PAUL FIRE AND MARINE INSURANCE COMPANY

Application Number

This bond expires in February 28, 1983

Penal Sum of Bond \$20,000.00 Plus Costs.

KNOW ALL MEN BY THESE PRESENTS, that we

Name of Applicant

JOSEPH GARNEAU Co., a Division of
BROWN-FORMAN DISTILLERS CORP.

Address of Place of Business

of 555 Madison Avenue, New York, New York

in the county of New York, State of New York, as Principal, and the ST. PAUL FIRE AND MARINE INSURANCE COMPANY having an office and usual place of business in the City of New York, State of New York, a surety company approved by the Superintendent of Insurance of New York State as to solvency and responsibility and authorized to transact business in New York State, as Surety, are held and firmly bound unto the People of the State of New York in the penal sum set forth above and for the payment of any costs taxed or allowed in any action or proceeding to the extent of One Thousand Dollars (\$1000.00) for the payment of which sum or sums, well and truly to be made, we, the said principal and surety, bind ourselves, successors,

Exhibit 1—Renewal Stipulation (1982-1983)

and assigns, respectively, jointly and severally, firmly by these presents.

WHEREAS, the above bounden principal is making application to the New York State Liquor Authority, for a license or permit under the Alcoholic Beverage Control Law and the said State Liquor Authority, by Part 81 of Subtitle B of Title 9 of the Official Compilation of the Codes, Rules and Regulations of the State of New York (Rule 9 of the Rules of the Authority), having required the principal to file with it a bond to the People of the State of New York, as provided in said Law aforesaid.

NOW, THEREFORE, the conditions of this obligation are such that if the said license or permit applied for, which expires on the date designated in said license or permit, is granted to the said principal and the principal will not, during the license or permit period, suffer or permit any violation of the provisions of the Alcoholic Beverage Control Law, or of any of the rules now or hereafter issued by said State Liquor Authority, or give cause, as provided in the Alcoholic Beverage Control Law or Part 53 of Subtitle B of Title 9 of the Official Compilation of the Codes, Rules and Regulations of the State of New York (Rule 36 of the Rules of the State Liquor Authority), for the cancellation, revocation or suspension of said license or permit or the issuance of an order of warning, and will pay all fines and penalties which shall accrue thereunder, together with all costs taxed or allocated in any action or proceeding brought or instituted for a violation of any of the provisions of said Alcoholic Beverage Control Law, or of any of the rules now or hereafter issued by said State Liquor

Exhibit 1—Renewal Stipulation (1982-1983)

Authority, or for cause for the cancellation, revocation or suspension or issuance of an order of warning as provided in the Alcoholic Beverage Control Law or Rules of the Authority, or costs taxed or allowed in any review pursuant to Section 121 of the Alcoholic Beverage Control Law; then this obligation shall be void; otherwise to remain in full force and effect; subject, however, to the following conditions:

1. An action for the breach of any condition of this bond may be maintained without previous conviction or prosecution for the violation of any provision of said Alcoholic Beverage Control Law, or of any of the rules now or hereafter issued by the State Liquor Authority, or for cause as provided by the Alcoholic Beverage Control Law or Part 53 of Subtitle B of Title 9 of the Official Compilation of the Codes, Rules and Regulations of the State of New York (Rule 36 of the Rules of the Authority).
2. The aggregate liability of the surety on account of any and all defaults hereunder shall in no event exceed the penal sum of this bond plus costs taxed or allowed in any action or proceeding to the extent of One Thousand Dollars (\$1000.00).
3. Upon the payment of any loss arising under this bond, the surety shall be subrogated to the rights and remedies of the obligee against the principal to recover from the principal any amount so paid.
4. Any action brought for the penal sum of this bond shall be commenced within twenty-four months after the expiration of the license or permit period aforementioned, or for costs within one year after final disposition of any action or proceeding. In

Exhibit 1—Renewal Stipulation (1982-1983)

the event of the institution of any action or proceeding to review the Authority's determination, the period of 24 months shall not commence until the final determination of the proceeding or litigation.

5. This bond shall be effective during the time the aforementioned license or permit shall be in effect and during any extension thereof.
6. A breach of any condition of this bond shall be deemed to have been established by the revocation, cancellation or suspension of the aforesaid license or permit or the issuance of an order of warning by the State Liquor Authority unless said revocation, cancellation, suspension or order of warning shall have been reversed or annulled by a Court of competent jurisdiction.
7. In any action or proceeding to recover on this bond, the principal and the company named herein as Surety waive any defense based upon any defect in the bond, including, but not limited to, an erroneous, improper or defective insertion or omission to insert or apparent alteration of the expiration year and/or amount of the penal sum of the bond and further waive any objection that the bond bears a printed, typewritten or facsimile signature. Any bond filed with the State Liquor Authority shall be admissible in evidence in any court on application of the State Liquor Authority or People of the State of New York without further proof of due execution thereof by or on behalf of the principal and surety and shall be conclusively presumed to have been duly executed by and on behalf of the principal and surety. Any bond filed with the State Liquor Authority and bearing the printed or facsimile name of the surety or the typewritten or facsimile

Exhibit 1—Renewal Stipulation (1982-1983)

signature of its representative shall be conclusively presumed to be the duly issued bond of the surety company and binding on it, its successors and assigns for the amount specified in Part 81 of Subtitle B of Title 9 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Rule 9 of the Rules of the State Liquor Authority).

IN WITNESS WHEREOF the parties hereto have caused these presents to be signed and sealed this 14th day of December, 1981.

JOSEPH GARNEAU Co., a Division of.
BROWN-FORMAN DISTILLERS
CORP., L.S.
Principal

ST. PAUL FIRE AND MARINE
INSURANCE COMPANY
Surety

By:

By: /s/ DONALD H. RODIMER

DONALD H. RODIMER
Attorney-in-fact

A62

Exhibit 2—Notice of Pleading and Hearing

Previously Reproduced at A11-A14.

A63

Exhibit 3—Transcript of Hearing—10/27/81

BEFORE THE STATE LIQUOR AUTHORITY

250 Broadway
New York, New York 10007

Serial No. WEST LL 1009

IN THE MATTER OF
Proceedings to Cancel or Revoke License Issued to

BROWN FORMAN DISTILLERS CORP.
One North Broadway
White Plains, New York

BEFORE:

ANDREW LEE AUBRY
Deputy Commissioner

APPEARANCES:

MICHAEL J. GREENFELD, Esq.
Council for Authority

WHITE & CASE, Esqs.
14 Wall Street
New York, New York 10005

By: MACDONALD FLINN, Esq.
of Counsel

—and—

SCHREIBER, TUNICK & MAC KNIGHT, Esq.
375 Park Avenue
New York, New York 10152

By: WILLIAM B. SCHREIBER, Esq.
of Counsel
Counsel for Licensee

Exhibit 3—Transcript of Hearing—10/27/81

ALSO PRESENT:

EDWARD HARRISON LEON R. TIMMONS, Esq.
Hearing Reporter

250 Broadway
New York, New York
October 27, 1981
12:00 o'clock noon.

[Tr. 2] Commisisoner Aubry: Go ahead.

Mr. Greenfeld: Mr. Commissioner, this is a proceeding to cancel or revoke Westchester LL 1009 Brown Forman Distillers Corp. at One North Broadway, White Plains, New York, pursuant to a notice of pleading with charges as follows:

That the licensee filed affirmations in connection with schedules filed with the Authortiy, since on or about May, 1979, in which it stated that the price of brands of liquor to wholesalers as set forth in the schedules would be no higher than the lowest price at which such brands of liquor would be sold by the licensee to wholesalers in any other State of the United States, whereas, in truth and in fact, the licensee during the same period of time provided allowances and/or inducements to wholesalers in other States which effectively caused the price of those brands of liquor to wholesalers in those other States to be lower than the price to wholesalers in New York State; all in violation of Section 101-B subdivision 3(d) of the Alcoholic Beverage Control Law.

Exhibit 3—Transcript of Hearing—10/27/81

[Tr. 3] Mr. Commissioner, I am going to depart at this time from usual practice in offering the pleadings in lieu of the fact that there will be other Exhibits which will also include a notice of pleading and hearing.

Commissioner Aubry: Just before we proceed any further, this is counsel for Brown Forman Distillers Corp., is that correct?

Mr. Flinn: Yes.

Commissioner Aubry: Is there any principal of the licensee present?

Mr. Flinn: Yes.

Commissioner Aubry: Are you a principal of the firm?

Mr. Timmons: Yes.

Commissioner Aubry: State your name.

Mr. Timmons: Leon R. Timmons, Senior, Attorney and Assistant Secretary of Brown Forman Distillers Corporation.

Commissioner Aubry: An officer of the corporation?

Mr. Timmons: Yes, I am.

Commissioner Aubry: I will explain to you, the licensee is entitled to be present and [Tr. 4] if the licensee is not present, I would like to put it on the record that the counsel has the authority to proceed without a licensee being present. In this case we do have a principal of the licensee present, so that has been established now.

Mr. Greenfeld: Mr. Commissioner, in lieu of any testimony being taken at this proceeding, the licensee

Exhibit 3—Transcript of Hearing—10/27/81

and the Authority have agreed to the facts in this case.

That agreement is contained in a document which the Authority at this time offers as an Exhibit in this evidence with Exhibits attached thereto. It is pointed out to the Commissioner that the document which consists of a statement has a part A and a part B.

Part A is stipulated to by and between counsel for the Authority and counsel for the licensee and the facts in this case.

Part B consists of a statement in lieu of the presentation by witnesses by the licensee which the Authority concedes those witnesses would testify to if they appear here and testified, but as to Part B, the Authority does not concede [Tr. 5] the truth of those statements of the testimony of those witnesses that testified.

The Exhibits which accompany the document are explained in the document itself.

The Authority at this time offers the entire document as one complete Exhibit.

Commissioner Aubry: Any objection?

Mr. Flinn: No objection.

Commissioner Aubry: That includes the notes of the Hearing?

Mr. Greenfeld: Yes.

Commissioner Aubry: Do you want to mark that as Authority's Exhibit 1.

(Whereupon, the document described above was received and marked as Authority's Exhibit 1, for identification, as of this date.)

Exhibit 3—Transcript of Hearing—10/27/81

Mr. Greenfeld: The Authority has only one other statement, Mr. Commissioner, and that is it would like to bring to your attention that in ascertaining the facts in this case you specifically take official notice of Section 101b sub division 3 paragraph (g) of the Alcoholic Beverage Control Law.

Commissioner Aubry: Did you say b or g?

[Tr. 6] Mr. Greenfeld: G.

Commissioner Aubry: As well as d.

Mr. Greenfeld: I assume you will scrutinize G since that is the basis of the charge.

The Authority rests.

Commissioner Aubry: I have one question, Mr. Greenfeld. As you explained, part b of the Exhibit contains or is stipulated that this is what the witnesses for the licensee would testify, but you do not stipulate as to the correctness of this testimony.

Mr. Greenfeld. That is correct.

Commissioner Aubry: If I do not hear the witnesses, how am I supposed to determine credibility?

Mr. Flinn: Your Honor, may I speak briefly?

Part B when your Honor has a chance in Chambers to study it, will give some additional explanation. We point out there that the legal contentions to which I have referred, that is Federal Constitutional legal issues.

Any other legal contentions are perhaps beyond the jurisdiction of the Authority to [Tr. 7] resolve.

The reasoning that and with a review to making the proceeding as efficient and effective and non-

Exhibit 3—Transcript of Hearing—10/27/81

wasteful as possible, we have by analogy two provisions of the Authority's rules, in essence made a tender or offer of proof. Mr. Greenfeld has objected to that testimony on the grounds that it is not relevant to the issues which are in the jurisdiction of the Authority to resolve.

Consequently, he is not in those circumstances cross examining the witnesses and, therefore, is not in a position to stipulate that what they would testify to is in fact truthful.

We acquiesce in that procedure. We are not asking your Honor to make any findings of fact based upon the material contained in B.

Our principal purpose is not only to make this proceeding as short, concise and effective as possible, but also to raise at the earliest possible moment the constitutional and legal issues which are principal defense in this proceeding.

As I indicated, I think so far as the [Tr. 8] basic facts, there is no major dispute between the parties.

Mr. Greenfeld has tendered to us and we have agreed to the stipulations contained in part A as to those facts which he believes are the relevant and essential facts to his establishing his case.

Mr. Greenfeld: Mr. Commissioner, if I may point out in all candor, the part A which contains the facts stipulated to are all facts obtained by the Authority with the full cooperation of the licensee and brought forward by the licensee as a result of interviews and Exhibits supplied by the licensee.

Exhibit 3—Transcript of Hearing—10/27/81

All the information obtained in this case has been obtained openly by the licensee. I will even go so far as to say that the licensee entered into this program which is the basis of the charge with full knowledge and notification to the Authority at the time that they first entered into it.

It is simply the Authority's position that this program which concerns activity not in New York State but in the State of Massachusetts [Tr. 9] violates the law in New York State.

It is the licensee's position that if it does, New York State's law is unconstitutional.

Commissioner Aubry: The main thing that I wanted to find out, I thought it was best to ascertain it while you gentlemen were here, was if I was supposed to decide the veracity, the truth and veracity of these with the witnesses. As long as I do not have to do that, then I am going to be put in a position of determining credibility from a statement, that is what I thought.

Now you explained it and I want to find out now why it was done. You have adequately explained it.

Mr. Grenfeld: The Authority has rested.

Mr. Flinn: We, in these circumstances which we have discussed with your Honor, have no evidence to present at this time. We rely upon the statement of our legal contentions which is in Part B of the document which has now been placed in evidence and I do not think I need to embellish it.

[Tr. 10] I think it is sufficiently stated there. We would, your Honor, like to avail ourselves of

Exhibit 3—Transcript of Hearing—10/27/81

the procedure that I understand is available that when your findings and recommendations to the Authority have been prepared, if we might receive a copy of those by mail and have a chance—

Commissioner Aubry: You have 15 days if you so desire to refute them.

Mr. Flinn: Thank you.

Commissioner Aubry: Nothing further on behalf of the licensee?

Mr. Flinn: No.

Commissioner Aubry: Anything else on behalf of the Authority?

Mr. Greenfeld: No.

Commissioner Aubry: That concludes the proceeding.

. . .

I, EDWARD HARRISON, hereby certify that the foregoing is a true and accurate transcript of the testimony taken at this proceeding.

EDWARD HARRISON
Hearing Reporter

Exhibit 3—Transcript of Hearing—10/27/81

BEFORE THE STATE LIQUOR AUTHORITY

250 Broadway
New York, New York 10007
Serial No. NEW YORK LL 585

IN THE MATTER OF

Proceedings to Cancel or Revoke License Issued to

BROWN FORMAN DISTILLERS CORP.
555 Madison Ave., New York, N.Y. 10022

BEFORE:

ANDREW LEE AUBRY
Deputy Commissioner

APPEARANCES:

MICHAEL J. GREENFELD, Esq.
Counsel for Authority

WHITE & CASE, Esqs.
14 Wall Street
New York, New York 10005

By: MACDONALD FLINN, Esq.
of Counsel

—and—

SCHREIBER, TUNICK & MAC KNIGHT, Esq.
375 Park Avenue
New York, New York 10152

By: WILLIAM B. SCHREIBER, Esq.
of Counsel
Counsel for Licensee

Exhibit 3—Transcript of Hearing—10/27/81

ALSO PRESENT:

EDWARD HARRISON LEON R. TIMMONS, Esq.
Hearing Reporter

250 Broadway
New York, New York
October 27, 1981
12:30 o'clock p.m.

[Tr. 2] Commissioner Aubry: Are you ready to proceed, Mr. Greenfeld?

Mr. Greenfeld: Yes. This is proceeding to revoke New York LL 585, issued to Brown Forman Distillers Corp. located at 555 Madison Avenue, New York, New York 10022, a notice of pleading and hearing dated May 22, 1981, containing one charge.

At this time I request that charge be spread on the record as if I read it into the transcript and I offer at this time a notice of pleading again dated May 22, 1981, as Authority's Exhibit in evidence.

Commissioner Aubry: Any objection?

Mr. Flinn: No objection.

Commissioner Aubry: Being no objection, the spread will be charged on the record and the notice dated May 22, 1981, is in the record in evidence.

(Whereupon, the document described above was received and marked as Authority's Exhibit No. 1 in evidence as of this date.)

Mr. Greenfeld: That the licensee filed affirmations in connection with the schedules [Tr. 3] filed with the Authority, since on or about May, 1979, in

Exhibit 3—Transcript of Hearing—10/27/81

which it stated that the price of brands of liquor to wholesalers as set forth in the schedule would be no higher than the lowest price at which such brands of liquor would be sold by the licensee to the wholesalers in any other State of the United States, whereas, in truth and in fact, the licensee during the same period of time provided allowances and/or inducements to wholesalers in other States which effectively caused the price of those brands of liquor to wholesalers in those other States to be lower than the price to wholesalers in New York State; all in violation of Section 101-b sub division 3(d), of the Alcoholic Beverage Control Law.

At this time, Mr. Commissioner, I request that the entire transcript of the prior proceeding which immediately preceded this disciplinary proceeding concerning Brown Forman Distillers Corporation under Serial Number Westchester LL 1009 be incorporated into this transcript with all the Exhibits attached thereto and at the same time I request that in regard to the Exhibits [Tr. 4] under Serial Number Westchester LL 1009, that the Exhibits therein, which contains with it an Exhibit A, that this notice of pleading and hearing concerning New York LL 585 be changed for the notice of pleading and hearing under Westchester LL 1009.

Commissioner Aubry: Any objection?

Mr. Flinn: No objection, your Honor.

Commissioner Aubry: I will do so.

Mr. Greenfeld: The Authority rests.

Exhibit 3—Transcript of Hearing—10/27/81

Commissioner Aubry: Anything on behalf of the licensee?

Mr. Flinn: Your Honor, we have no evidence to offer. We merely reiterate our request, your Honor, that we would like to have a copy of your findings and recommendations to the Authority in advance of the formal summation to the Authority as the rules provide.

Commissioner Aubry: You will get a copy of the findings and report.

Nothing further?

Mr. Flinn: Nothing further, your Honor.

Commissioner Aubry: Anything on behalf of the Authority?

[Tr. 5] Mr. Greenfeld: Nothing.

Commissioner Aubry: Thank you. The hearing is closed.

Mr. Greenfeld: . . . Mr. Commissioner, I am going to depart at this time from usual practice in offering the pleadings in lieu of the fact that there will be other Exhibits which will also include a notice of pleading and hearing.

Commissioner Aubry: Just before we proceed, any further, this is counsel for Brown Forman Distillers Corp., is that correct?

Mr. Flinn: Yes.

Commissioner Aubry: Is there any principal of the licensee present?

Mr. Flinn: Yes.

Commissioner Aubry: Are you a principal of the firm?

Exhibit 3—Transcript of Hearing—10/27/81

Mr. Timmons: Yes.

Commissioner Aubry: State your name.

Mr. Timmons: Leon R. Timmons, Senior Attorney and Assistant Secretary of Brown Forman Distillers Corporation.

Commissioner Aubry: An officer of the [Tr. 6] corporation?

Mr. Timmons: Yes, I am.

Commissioner Aubry: I will explain to you, the licensee is entitled to be present and if the licensee is not present, I would like to put it on the record that the counsel has the authority to proceed without a licensee being present. In this case we do have a principal of the licensee present, so that has been established now.

Mr. Greenfeld: Mr. Commissioner, in lieu of any testimony being taken at this proceeding, the licensee and the Authority have agreed to the facts in this case.

That agreement is contained in a document which the Authority at this time offers as an Exhibit in this evidence with Exhibits attached thereto. It is pointed out to the Commissioner that the document which consists of a statement has a part A and a part B.

Part A is stipulated to by and between counsel for the Authority and counsel for the licensee and the facts in this case.

Part B consists of a statement in lieu [Tr. 7] of the presentation by witnesses by the licensee which the Authority concedes those witnesses would testify

Exhibit 3—Transcript of Hearing—10/27/81

to if they appear here and testified, out as to Part B, the Authority does not concede the truth of those statements of the testimony of those witnesses that testified.

The Exhibits which accompany the document are explained in the document itself.

The Authority at this time offers the entire document as one complete Exhibit.

Commissioner Aubry: Any objection?

Mr. Flinn: No objection.

Commissioner Aubry: That includes the notes of the Hearing?

Mr. Greenfeld: Yes.

Commissioner Aubry: Do you want to mark that as Authority's Exhibit 1.

(Whereupon, the document described above was received and marked as Authority's Exhibit 1, for identification, as of this date.)

Mr. Greenfeld: The Authority has only one other statement, Mr. Commissioner, and that is it would like to bring to your attention that in ascertaining the facts in this case you [Tr. 8] specifically take official notice of Section 101b sub division 3 paragraph (g) of the Alcoholic Beverage Control Law.

Commissioner Aubry: Did you say b or g?

Mr. Greenfeld: G.

Commissioner Aubry: As well as d.

Mr. Greenfeld: I assume you will scrutinize g since that is the basis of the charge.

The Authority rests.

Exhibit 3—Transcript of Hearing—10/27/81

Commissioner Aubry: I have one question, Mr. Greenfeld. As you explained, part b of the Exhibit contains or is stipulated that this is what the witnesses for the licensee would testify, but you do not stipulate as to the correctness of this testimony.

Mr. Greenfeld: That is correct.

Commissioner Aubry: If I do not hear the witnesses, how am I supposed to determine the credibility?

Mr. Flinn: Your Honor, may I speak briefly?

Part B when your Honor has a chance in Chambers to study it, will give some additional explanation. We point out there that the legal [Tr. 9] contentions to which I have referred, that is Federal Constitutional legal issues.

Any other legal contentions are perhaps beyond the jurisdiction of the Authority to resolve.

The reasoning that and with a review to making the proceeding as efficient and effective and non wasteful as possible, we have by analogy two provisions of the Authority's rules, in essence made a tender or offer of proof. Mr. Greenfeld has objected to that testimony on the grounds that it is not relevant to the issues which are in the jurisdiction of the Authority to resolve.

Consequently, he is not in those circumstances cross examining the witnesses and, therefore, is not in a position to stipulate that what they would testify to is in fact truthful.

Exhibit 3—Transcript of Hearing—10/27/81

We acquiesce in that procedure. We are not asking your Honor to make any findings of fact based upon the material contained in B.

Our principal purpose is not only to make this proceeding as short, concise and effective as possible, but also to raise at the earliest [Tr. 10] possible moment the constitutional and legal issues which are principal defense in this proceeding.

As I indicated, I think so far as the basic facts, there is no major dispute between the parties.

Mr. Greenfeld has tendered to us and we have agreed to the stipulations contained in part A as to those facts which he believes are the relevant and essential facts to his establishing his case.

Mr. Greenfeld: Mr. Commissioner, if I may point out in all candor, the part A which contains the facts stipulated to are all facts obtained by the Authority with the full cooperation of the licensee and brought forward by the licensee as a result of interviews and Exhibits supplied by the licensee.

All the information obtained in this case has been obtained openly by the licensee. I will even go so far as to say that the licensee entered into this program which is the basis of the charge with full knowledge and notification to the Authority at the time that they first [Tr. 11] entered into it.

It is simply the Authority's position that this program which concerns activity not in New York State but in the State of Massachusetts violates the law in New York State.

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It is the licensee's position that if it does, New York State's law is unconstitutional.

Commissioner Aubry: The main thing that I wanted to find out, I thought it was best to ascertain it while you gentlemen were here, was if I was supposed to decide the veracity, the truth and veracity of these with the witnesses. As long as I do not have to do that, then I am going to be put in a position of determining credibility from a statement, that is what I thought.

Now you explained it and I want to find out now why it was done. You have adequately explained it.

Mr. Greenfeld: The Authority has rested.

Mr. Flinn: We, in these circumstances which we have discussed with your Honor, have no evidence to present at this time. We rely upon [Tr. 12] the statement of our legal contentions which is in part B of the document which has now been placed in evidence and I do not think I need to embellish it.

I think it is sufficiently stated there. We would, your Honor, like to avail ourselves of the procedure that I understand is available that when your findings and recommendations to the Authority have been prepared, if we might receive a copy of those by mail and have a chance—

Commissioner Aubry: You have 15 days if you so desire to refute them.

Mr. Flinn: Thank you.

Commissioner Aubry: Nothing further on behalf of the licensee?

Mr. Flinn: No.

Exhibit 3—Transcript of Hearing—10/27/81

Commissioner Aubry: Anything else on behalf of the Authority?

Mr. Greenfeld: No.

Commissioner Aubry: That concludes the proceeding.

* * *

[Tr. 13] I, EDWARD HARRISON, hereby certify that the foregoing is a true and accurate transcript of testimony taken at this proceeding.

EDWARD HARRISON
Hearing Reporter

Stipulated Undertaking On The Record By Counsel**STATE OF NEW YORK LIQUOR AUTHORITY**

IN THE MATTER OF
PROCEEDINGS TO CANCEL OR REVOKE

Serial No. West LL 1009

Issued to: BROWN-FORMAN DISTILLERS CORP.

Licensed Premises: One North Broadway
White Plains, N.Y.

A.

Solely for the purposes of this proceeding before the New York State Liquor Authority (the "Authority") and any judicial review thereof (and for no other purpose whatsoever), the licensee herein, Brown-Forman Distillers Corporation ("Brown-Forman") stipulates and agrees to accept the procedures and factual contentions of counsel for the Authority set forth in this Part A of this stipulated undertaking, which will be made part of the record herein to be considered by the Authority and any reviewing court. If, however, the Authority should conclude that additional evidence is necessary to its resolution of the issues in this proceeding, a further hearing for that purpose upon notice to Brown-Forman sufficient to allow it to prepare therefor may be scheduled.

1. The Authority is the duly constituted agency of the State of New York whose function it is to administer and

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enforce the provisions of the Alcoholic Beverage Control Law.

2. Brown-Forman is a corporation duly organized and existing under the laws of the State of Delaware, which has qualified to transact business in the State of New York. Brown-Forman has an office at One North Broadway, White Plains, New York, and 555 Madison Avenue, New York, New York.

3. Brown-Forman is engaged in the business of manufacturing distilled spirits and importing wines and spirits, which it sells in interstate commerce to wholesalers in more than 30 states, including New York.

4. By Notice of Pleading dated May 22, 1981, the Authority commenced proceedings to revoke Brown-Forman's Wholesale Liquor License, charging as follows:

That the licensee filed affirmations in connection with schedules filed with the Authority, since on or about May 1979, in which it stated that the price of brands of liquor to wholesalers as set forth in the schedules would be no higher than the lowest price at which such brands of liquor would be sold by the licensee to wholesalers in any other state of the United States, whereas in truth and in fact, the licensee during the same period of time provided allowances and/or inducements to wholesalers in other states which effectively, caused the price of those brands of liquor to wholesalers in those other states to be lower than the price to wholesalers in New York State; all in violation of Section 101-b, subdivision 3(d) of the Alcoholic Beverage Control Law.

Stipulated Undertaking On The Record By Counsel

A copy of the Notice of Pleading and Hearing is annexed hereto as *Exhibit "A"*.

5. For purposes of these proceedings, the facts relating to allowances given to wholesalers by the B-F Spirits, Ltd. sales division of Brown-Forman ("B-F Spirits") in Massachusetts, as hereinafter set forth, are representative of what occurred in the other states in which similar allowances were given by Brown-Forman. For purposes of making findings of fact and conclusions of law, the Hearing Officer in these proceedings may adopt such facts as if they were introduced with respect to the activities of Brown-Forman in each of the states where such activities took place.

6. On or about May 26, 1978, the Bureau of Alcohol, Tobacco & Firearms ("BATF") approved, in writing, a request by Brown-Forman for permission to conduct a marketing and promotional program (the "Program") with each of the wholesalers throughout various states of the United States. A copy of the written approval of the BATF and the memorandum of Brown-Forman describing the Program, upon which the BATF approval was based, are annexed hereto as *Exhibit "B"*. The Authority takes no position nor does it stipulate as to whether the Program, as implemented, is in conformity with the approval of the BATF.

7. The Program involves the payment of monies in the form of promotional allowances by Brown-Forman to its

Stipulated Undertaking On The Record By Counsel

wholesalers in both affirmation* and non-affirmation states throughout the United States. The promotional allowances to be paid to each wholesaler are determined in annual lump sum amounts payable quarterly in the form of credit memoranda issued by Brown-Forman to its wholesalers in each State or sales area, as the case may be. *Exhibit "C"* is a sample of such credit memoranda.

The annual allocation for each fiscal year to a sales territory (i.e., a state) from which these promotional allowances are thereafter calculated and granted to the respective wholesalers in that state is determined by Brown-Forman based initially upon budget requests by the State Manager for that state on a "Market Planning Form" in which he recommends a total dollar figure for the promotional allocation ("P.A.") on a per brand and dollar per case basis. *Exhibit "D"* is a sample of the "Market Planning Form" for the fiscal year 1982 prepared by the Massachusetts State Manager for Canadian Mist whisky. As indicated in *Exhibit "D"*, post-downs of prices from wholesales to retailers are one type of wholesaler promotional activity expected to be engaged in by wholesalers receiving promotional allowances, and, in fact were engaged in.

Utilizing the "Market Planning Forms," Brown-Forman then determines on a per brand basis the amount to

* The term "affirmation states" refers to approximately 20 states which have a law that requires a distiller and/or importer of distilled spirits to "affirm" that the prices at which it sells its brands to wholesalers in the affirmation state will be no higher than the lowest price at which it sells the same brands to wholesalers anywhere else in the United States during that period of time. New York was the first affirmation state, and the affirmation statutes of the other states have been patterned after and are administered in essentially the same way as New York's.

Stipulated Undertaking On The Record By Counsel

be allocated to each state for promotional allowances to wholesalers there. A "Quota & Budget Planning Sheet" is used in making that determination, and *Exhibit "E"* is the copy of that form for the fiscal year 1982 prepared in arriving at budgets for the promotion of Canadian Mist in Massachusetts.

The procedures and other facts stipulated to in this paragraph 7 may be taken as representative of the manner in which Brown-Forman has determined the aggregate amounts to be allocated to each state for promotional allowances to the wholesalers there in each of the fiscal years 1980 to date (i.e., 1980 through 1982, inclusive). Fiscal year 1980 commenced May 1, 1979 and ended April 30, 1980.

8. Following receipt of the BATF approval, Brown-Forman obtained approval from Mr. John Larkin, Chairman of the Massachusetts Alcoholic Beverage Control Commission, to conduct the Program in Massachusetts, and in fact did so beginning with fiscal year 1980 to the present time. Massachusetts is an affirmation state. Annexed hereto as *Exhibits "F"* and *"G"* are copies of the Brown-Forman records kept in the regular course of business which show all sales and allowances, respectively, to Massachusetts wholesalers for fiscal years 1980 and 1981 (fiscal 1982 does not end until April 30, 1982).

Excluding the payment of any promotional allowances to its wholesalers (and no interpretation or conclusion is stipulated to in regard to the payment of said promotional allowances), Brown-Forman supplies alcoholic beverages to wholesalers in Massachusetts and other affirmation states at the affirmed price, which is the same as the affirmation

Stipulated Undertaking On The Record By Counsel

price at which Brown-Forman supplies alcoholic beverages to wholesalers in New York State. The affirmed price is, therefore, also the lowest price.

9. The New York State Liquor Authority was requested to permit Brown-Forman to conduct the Program in New York, but refused on the ground that Section 101-b, subds. (2)a, (d) and (g) of the Alcoholic Beverage Control Law prohibit any allowances or inducements except quantity discounts and a discount for payment within a prescribed time.

B.

Brown-Forman contends that, as a matter of law, the charges against it in this proceeding cannot be sustained in that neither Section 101-b, subdivision 3(d) of the Alcoholic Beverage Control Law nor any other provision of New York's affirmation statute can be interpreted to make any of the affirmations Brown-Forman has filed with the Authority in violation of that statute because of any promotional allowances paid to wholesalers elsewhere under the Program and any interpretation or conclusion to the contrary would make the application of that statute unconstitutional with respect to the Commerce Clause and due process requirements of the federal Constitution. Recognizing that such issues may not be within the jurisdiction of the Authority to decide or resolve and because counsel for the Authority object to all of the tendered evidence hereafter outlined on the ground that the purpose behind the promotional allowances paid to wholesalers elsewhere, how such allowances have been treated under

Stipulated Undertaking On The Record By Counsel

the laws of any other jurisdiction, state or federal, and any other facts as to how those allowances are determined, made available and used are irrelevant to the issues to be resolved in this proceeding, Brown-Forman, to avoid unnecessary and wasteful expenditure of time, effort and money by both sides while preserving its contentions for all purposes in whatever proceeding or forum may be appropriate, tenders the following evidence, to which its representatives would testify under oath, in the nature of an avowal or offer of proof. Counsel for the Authority stipulate only that witnesses, if called, would so testify.

1. The BATF approval of Brown-Forman's Program (described in Part A, par. 6 *supra*) followed the issuance of that federal agency's Bulletin 77-17. On January 2, 1979, having received approval from the BATF to conduct the Program, Brown-Forman sent a memorandum to its Regional Managers (Regional Sales Directors) describing the Program and setting forth the procedure to be followed with respect to implementing the Program with the wholesalers. A copy of that memorandum is annexed hereto as *Exhibit "H"*.

2. The program is designed to encourage and support the promotion of Brown-Forman's brands in achieving the most vigorous, effective competition possible with the brands of other distillers or suppliers by means of allowances to wholesalers in both affirmation and non-affirmation states which enable them to engage in any of a variety of promotional activities in support of whatever brands or container sizes (varying significantly from market to mar-

Stipulated Undertaking On The Record By Counsel

ket and, even within a single market, from time to time) may be dictated by the competitive forces in the particular market at the particular time. Determined individually for each wholesaler in annual lump sum amounts not earmarked for, identified with or restricted to any particular brand, these allowances are formulated in terms of the competitive posture of the particular wholesaler's market area and afford him the flexibility to expend the funds advanced for those promotional activities considered most effective in responding to the changing, unforeseen exigencies of the competitive forces encountered in that market over the course of the fiscal year (May 1 through April 30).

3. More specifically, under the Program there is no requirement, agreement, or understanding that the lump sums advanced will be used for any particular Brown-Forman brand or for any particular type of promotional activity by the wholesaler. Each wholesaler makes the determination as to what brands, if any, the extent to which, how, and when the money advanced will be used for promotional activities. No accounting is required of the wholesaler as to whether, how or for what brands, if any, the sums advanced have been spent. In fact, because the wholesalers are not even obligated to use the money advanced to them to promote the sale of Brown-Forman brands, the Program has been continuously known by both Brown-Forman personnel and the wholesalers as the "no strings" or "77-17" Program. Brown-Forman, however, is free to discontinue or reduce the amount of any allowances in subsequent years depending upon its judgment as to how its brands are faring in competition with those of

Stipulated Undertaking On The Record By Counsel

other suppliers in the market area of the particular wholesaler and whether the allowances have been effectively used to promote Brown-Forman Brands.

4. In addition to helping underwrite the cost of other promotional activities undertaken by the wholesalers which are unrelated to their resale prices, the allowances have been used for price reductions or discounts to retail accounts on particular Brown-Forman brands or container sizes. The timing and amount of these discounts, however, have been independently determined by each wholesaler in terms of the particular competitive circumstances of his market and have varied from one to another.

5. Once the amount of the lump sum allowance for any wholesaler for a given fiscal year has been decided by Brown-Forman and communicated to him, that amount does not vary and is not affected by the number of cases of Brown-Forman brands (either individually or collectively) which the wholesaler actually sells. That amount is not determined on the basis of either (1) any per case allowance multiplied by the number of cases of Brown-Forman brands (either collectively or individually) that the wholesaler sells during that fiscal year or has previously sold or (2) the price that the wholesaler will pay or has paid for any Brown-Forman brand or of any discount or resulting lower net price to the wholesaler.

6. The procedure by which Brown-Forman determines the amount of the allowance to be paid to each wholesaler begins with the State Manager, who, prior to the start of the fiscal year, meets separately with each wholesaler in

Stipulated Undertaking On The Record By Counsel

the state which is his assigned territory. The general purpose of these meetings is to review the position of each Brown-Forman brand in the market area served by the particular wholesaler, set projected goals to attempt to achieve during the next year and discuss the promotional activities believed likely in that market to help attain those goals.

7. To achieve the most effective interbrand competition with the brands of other suppliers, Brown-Forman, like other alcoholic beverage suppliers and their respective wholesalers, is interested in many factors related to the promotion and placement of its brands in each market area, including not only price discounting to retailers but also advertising display and all of the other activities designed to build consumer brand awareness and demand and to stimulate and sustain sales volume over the long term in competition with other brands. During the course of these meetings with the wholesalers, therefore, there are discussed, among other things, the number of retail outlets in which each brand (and each size of each brand) is sold, the discount structure of each brand *vis-a-vis* the competing brands of other suppliers, the entire spectrum of promotional activities engaged in by each wholesaler in his particular market area during the preceding year, the relative success of each of those promotional activities in achieving the goals sought, and the particular promotional activities planned to attain the goals for the next fiscal year.

8. Because the competitive forces confronting a brand and its relative position vary significantly from one market area to another, individual analysis and detailed evaluation

Stipulated Undertaking On The Record By Counsel

of what promotional activities are necessary to achieve the best competitive posture for that brand must be conducted on a market-by-market basis. The type and extent of the promotional activities necessary to support or advance a brand vary substantially from market to market at any given time. For example, with respect to any single brand, competition dictates significantly different discounts and timing on post-downs and quantity discount promotional programs from market area to market area even within the same state. While discounts differing both in amount and time are given in some market areas, no discounts are given on the same brand or container size in other markets. The costs to the wholesalers of performing the different promotional activities necessary in each of the many market areas vary among the wholesalers at any given time, therefore, not merely in terms of the differing volumes of a brand which they sell but also on a unit cost basis (*i.e.*, the expense per case or bottle incurred for promotional activities).

9. To assist it in evaluating the relative performance of its brands in each market area, Brown-Forman employs independent market research firms to conduct studies of market conditions which indicate, among other things, the extent of distribution of the Brown-Forman brands in retail outlets in the various market areas in the state, the number of sizes of the brand offered in each outlet, the average consumer price of the brand in each market, the number of facings (*i.e.*, number of bottles of the brand on the shelf) in each outlet, the shelf position of the bottles of the brand in each outlet, the number of displays of the

Stipulated Undertaking On The Record By Counsel

brand in the stores surveyed and the type of display (*i.e.*, floor, counter or mobile), and other factors. The surveys by these market research firms help the State Manager and Brown-Forman to determine whether the goals established for promoting its brands have been met. These surveys are one factor used in determining in general what promotional activities merit wholesaler continuation and financial support because they have been effective in his market, and, based upon their projected costs, what promotional allowances would be necessary to help cover costs of that general magnitude.

10. Responsive to all of these considerations, at their meeting the State Manager and the wholesaler, after reviewing and analyzing the position of each specific Brown-Forman brand in the market, discuss and decide in general terms or estimates upon certain goals to seek for each brand during the next year. In addition to projecting case sales targets or quotas, some of the areas they consider are market share, store distribution by container size, shelf position of the brand in the stores, number of retail accounts purchasing the brand, and so on. They discuss the promotional activities by which the wholesaler can hopefully achieve these goals, including price-discounting, distribution drives, salesmen's incentive programs, point-of-sale and/or display installations in stores, consumer and retailer sampling, advertising, and others. They also discuss the amount of money likely to be required to conduct such promotional activities during the next fiscal year. More specifically, for each brand the total number of cases which they estimate can be sold in the coming fiscal year is

Stipulated Undertaking On The Record By Counsel

projected. In addition, they make the best estimate they can of the approximate cost of conducting all promotional activities (including price post-downs, quantity discounts, sales incentive programs, point of sale displays, shelf positioning and other promotional programs) deemed likely in the wholesaler's particular market area to achieve that projected sales volume even though they recognize that changed or unforeseen competitive circumstances during the fiscal year may compel different promotional activities and/or different actual costs.

11. Following his meetings with each wholesaler in his state and based in part upon the information developed there, the State Manager prepares "Market Planning Forms" for each Brown-Forman brand. These forms are used solely for Brown-Forman internal budget analysis and planning and are neither shown to nor discussed with any wholesaler. Making any revisions he deems necessary and appropriate in light of likely budget limitations or his own independent view of the prior promotional efforts and the potential of the brand in each market in his state, the State Manager aggregates on a statewide total basis both the individual wholesaler case sales projections and the estimated cost of each of the various types of promotional activities.* These forms are used simply as a preliminary

* For purposes of comparison and evaluation of the reasonableness of the projections for the coming fiscal year, the State Manager also enters on this form for the then current fiscal year the estimated sales or depletion figures and the projected costs incurred by the wholesalers for the various promotional activities, again on a per case and total cost basis. These current fiscal year figures must be estimated to the extent that two or three months remain before the end of that period on April 30 and, therefore, actual figures for the entire year are not then available.

Stipulated Undertaking On The Record By Counsel

basis for considering at meetings held in March at Brown-Forman's Louisville, Kentucky headquarters the total amount of wholesaler promotional allowances to be budgeted to his state. *Exhibit "D"* is a copy of the "Market Planning Form" prepared for Brown-Forman's Canadian Mist brand of whiskey in Massachusetts for fiscal 1982.

12. On this particular "Market Planning Form," at page 1 under the column headed "Flat Cs. or Per Cs.", the Massachusetts State Manager estimated that the total cases of Canadian Mist, including all container sizes, which would be sold or depleted in that state by the end of fiscal 1981 would be 80,570. For budget planning purposes, he recommended that 82,000 cases be taken as the estimated total for fiscal 1982.

13. With respect to sales at price post-downs by any of the wholesalers, the State Manager reported that based upon the distributor projections he estimated that by the end of fiscal 1981 a total of 55,875 cases would have been sold in the various markets of the state at a total cost of \$144,897, i.e., reductions or costs averaging \$2.59 per case.*

* On this and any other forms used in the budget planning procedure, the total costs, whether actual or merely projected, attributed to wholesaler promotional activities are divided by the corresponding case sales or depletion figures, actual or projected, to arrive at a statewide average or aggregate "per case" cost figure even though that figure is not the "per case cost" actually incurred by any wholesaler. The purpose is to allow more meaningful, instant comparison of projected costs against those for earlier periods and in other states. For example, comparative statewide "per case" average cost figures permit evaluation of the reasonableness of the next fiscal year's projected costs to Brown-Forman against the costs it or the wholesaler

(footnote continued on next page)

Stipulated Undertaking On The Record By Counsel

By comparison, for budget planning he recommended that projected distributor post-downs for fiscal 1982 should be estimated as a total of 58,687 cases at a total cost of \$147,131 or an average reduction or cost of \$2.51 per case.

14. With respect to quantity discounts by any of the wholesalers, the State Manager reported that based upon the distributor projections he estimated that by the end of fiscal 1981 a total of 24,695 cases would have been sold in the various markets of the state at a total cost of \$42,181 or discounts or costs averaging \$1.71 per case. For budget planning, he recommended that projected distributor quantity discounts for fiscal 1982 should be estimated as a total of 23,313 cases at a total cost of \$37,050 or an average discount or cost of \$1.59 per case.

17. With respect to federal military sales, the State Manager reported that based upon projections he estimated that by the end of fiscal 1981 a total of 750 cases would have been sold statewide at discounts given by Brown-Forman or costs to it of \$2.00 per case or a total cost of \$1,500. For budget planning, he recommended that projected discounts by Brown-Forman should be estimated as a total of 825 cases, again at a discount or cost of \$2.00 per case or a total cost of \$1,650.

has incurred in the same state in prior years. Further, because the total cost of promotional activities in a large state such as Massachusetts should typically be much higher than in a small state such as Delaware, dividing the total costs projected by the appropriate total case figure permits, at a glance, a more realistic comparison of the amounts under consideration for one state in relation to those for the other states. This is an essential part of breaking down a total national budget figure and allocating it among the states.

Stipulated Undertaking On The Record By Counsel

18. At page 2, the State Manager similarly outlined for a variety of wholesaler non-price promotional programs (i.e., distribution drives, shelving activities, salesmen incentives, on premise promotion activities, and others) the projected total costs likely to be incurred by the end of fiscal 1981 (\$52,968) and based upon the distributor projections his recommended estimate of the fiscal 1982 total costs for similar non-price promotional activities (\$48,052).

19. At the bottom of pages 1 and 2, all of these projected total costs for the different types of price-related and non-price promotional activities were summarized. The grand total of \$233,883 (or \$2.85 per case, derived by dividing that amount by the projected 82,000 case sales figure) was recommended by the State Manager for budget planning purposes as the minimum amount to be allocated from Brown-Forman's national budget for Canadian Mist promotional activities within Massachusetts.

20. The March budget meetings, held separately for each Brown-Forman brand, are attended by the State Manager, his superior, the Regional Manager, the Brand Manager who has responsibility on a national basis for the particular brand, and representatives of the Sales Administration Department. At these meetings a "Quota & Budget Planning Sheet" is used in arriving at statewide target sales quotas or goals and in determining for budget purposes and allocating among each of the states all of the expenditures Brown-Forman will expect to incur in marketing and promoting that brand during the coming

Stipulated Undertaking On The Record By Counsel

fiscal year. Exhibit "E" is a copy of that form which was prepared for Canadian Mist budgeting for Massachusetts for fiscal year 1982. In Column 6, the number of cases (83,000) agreed upon at the meeting as the goal or quota for the next fiscal year for the particular state is entered on the first line.* On the third and fourth lines, there are entered in Column 6 opposite "Mktg. P.A." a dollar amount (\$236,550) and on the next line a "per case" figure (\$2.85). That dollar amount represents the judgment of the marketing personnel in attendance as to the minimum amount which should be allocated to Massachusetts for promotional allowances to wholesalers there in the next fiscal year and is calculated simply by multiplying the statewide sales goal or quota upon which they have agreed (i.e., 83,000 cases) by the per case projection of \$2.85 which the State Manager entered upon the "Market Planning Form" (based upon his recommended total of a minimum \$233,883 statewide allocation for wholesaler promotional allowances divided by his earlier, lower estimated sales goal or target of 82,000 cases).

21. The statewide total (\$252,750) finally authorized by the Brown-Forman financial officials for Massachusetts, whether determined at the March budget meeting or thereafter, is entered in Column 6 at the bottom of the "Quota

* In Column 4, the State Manager's earlier recommended estimate of the total number of cases to be sold in his state by the end of the current fiscal year is entered and, based upon the Brand Manager's computer records of the national sales trend for the brand, the latest projection of total case sales for that current year is agreed upon as one of the factors to be considered in setting the target or quota for the coming fiscal year.

Stipulated Undertaking On The Record By Counsel

& Budget Planning Sheet" opposite "Financial P.A." the "per case" budget cost to Brown-Forman shown on the last line of Column 6 is obtained simply by dividing the total amount budgeted to Massachusetts (\$252,750) by the projected sales target or quota (83,000 cases).^{*} The "per case" budget cost, thus determined separately for each state, varies from state to state for the same brand. Neither these "Quota & Budget Planning Sheets" nor their contents are shown to or discussed with any wholesaler.

22. Thus, as shown by the fiscal 1982 budget allocation for Canadian Mist in Massachusetts, the statewide total dollar amount of promotional allowances authorized and budgeted for a brand may be greater or less than the comparable total of the projections for all of the wholesalers which the State Manager has earlier aggregated and entered upon the "Market Planning Forms" as a minimum total that he recommended should be allocated to his state. Consequently, after the March budget meetings, the State Manager will then compute for each wholesaler a specific amount which is calculated simply by applying to the budget figure authorized by the financial personnel the percentage which is equal to the particular wholesaler's

^{*} The remaining lines of the "Quota & Budget Planning Sheet" are unrelated to any promotional allowances to wholesalers. They cover a variety of other expenditures directly incurred by Brown-Forman for the brand and allocated among the states for budget purposes. To illustrate, advertising expenditures by Brown-Forman, including magazine, newspaper, outdoor signs, and so on are covered both in terms of prior expenditures for those classifications and the budget figures agreed to for the coming fiscal year and allocated to each state.

Stipulated Undertaking On The Record By Counsel

proportional share of the earlier aggregated projections. The specific amounts computed by brand are not communicated by any wholesaler. Instead, the specific amounts thus determined for all of the Brown-Forman brands are added together in a single lump sum for each wholesaler, who is then advised only that that amount will be credited quarterly during the new fiscal year.^{*}

23. The budget purpose and nature of the internal Brown-Forman procedures outlined above are emphasized by the fact that the sales goals projected may turn out to be significantly inaccurate. For example, the 83,000 case projection for sales of Canadian Mist in Massachusetts in fiscal 1982 is already demonstrably low. In fact, with the peak holiday selling period only starting, the wholesalers in that state are selling at a rate which will insure sales for the fiscal year of at least 92,000 cases.

24. The fact that the "no strings" allowances advanced under the Program bear no relationship to the volume of case sales of Brown-Forman's brands by the

^{*} Each quarterly credit memorandum advises the wholesaler that: "The above amount is being credited to your account within the requirements of BATF Ruling 77-17. Our program was approved by BATF on May 26, 1978. This credit is being issued with no restriction by us or obligation by you as to the use of these funds. This amount is not related in any way to the number of cases of any B-F Spirits Ltd. products sold nor is it in any way related to the price paid by you for these products. All reporting of amounts credited herein, both for financial and tax purposes, is your responsibility. The plan may be cancelled at any time since the advancement of this sum does not obligate either party in any way." See Exhibit "C".

Stipulated Undertaking On The Record By Counsel

wholesalers is further illustrated by the records of the sales and allowances to Massachusetts wholesalers for the fiscal years 1979 and 1980, which were submitted at the request of the Authority. See Exhibits "F" and "G". For example, in those two years case sales by McKesson Wines & Spirits of Norwood, Mass. increased from 34,000 to 40,000 cases, but the "no strings" allowances advanced to that wholesaler decreased from approximately \$99,000 to \$73,000. Case sales of Brown-Forman brands by C. Pappas were more or less stable at 33,000 and 32,000 cases, respectively, in fiscal 1979 and 1980, but the allowances paid under the Program to this wholesaler decreased from \$118,000 to \$81,000 in those two years.

25. Although the Massachusetts law requires that all discounts be set forth in a price schedule filed monthly, Brown-Forman was not required to reflect the monetary advances made under the Program on the schedule of prices to wholesalers for its brands that it has filed monthly with the Massachusetts Commission. Neither Massachusetts nor any other affirmation state has required the lowering of the prices charged to wholesalers pursuant to their affirmation statutes because of "no strings" payments to wholesalers elsewhere. Like New York, however, all of the other affirmation states require that if a lower price is affirmed or charged anywhere else for a brand its

Stipulated Undertaking On The Record By Counsel

price must be lowered to the same level or its sale will be prohibited by their affirmation statutes.

Counsel for State Liquor Authority:

By (Illegible)

Counsel for the Licensee,
Brown-Forman Distillers Corporation:

SCHREIBER, TUNICK & MacKNIGHT

By (Illegible)

375 Park Avenue
New York, New York 10152

WHITE & CASE

By MACDONALD FLINN

14 Wall Street
New York, New York 10005

Dated: October 27, 1981

**Exhibit 6—Memorandum Decision of
State Liquor Authority**

NEW YORK STATE LIQUOR AUTHORITY

FULL BOARD AGENDA

WEEK OF JANUARY 4, 1982

REFERRED FROM : HEARING BUREAU

820003

WESTCHESTER LL 1009

Brown Forman Distillers Corp.

One North Broadway

White Plains, New York

REASON FOR REFERRAL

1. Filed affirmations

Sec. 101-b.3(d)

MP: Revocation

To be considered with Index #820002.

NOTES: 1. Licensee's attorney had until January 4, 1982 to submit controversion.

2. This proceeding was commenced by notice dated May 22, 1981 and the hearing was completed on October 27, 1981. The minutes were delivered on November 23, 1981 and Hearing Officer Aubry submitted his report on December 16, 1981.

The Members of the Authority at their regular meeting held at the Zone 1 New York Office on February 3, 1982 determined:

**Exhibit 6—Memorandum Decision of
State Liquor Authority**

Hearing Officer's findings adopted and charge sustained.

The appropriate penalty is 10 days deferred plus a \$20,000 bond claim.

The Members of the Authority in imposing this penalty have taken into consideration the fact that the licensee has not been suspended or received any other adjudicated penalty within the past five years.

Chairman McLaughlin, Comms. Marius and Flynn present and voting for the above. Comm. Doyle present and voting for cancellation plus a \$20,000 bond claim.

/s/ BARBARA JOANNI LOED
SECRETARY TO THE AUTHORITY

1-2-4-5
BJL:jb

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A104

*Exhibit 6—Memorandum Decision of
State Liquor Authority*

NEW YORK STATE LIQUOR AUTHORITY

FULL BOARD AGENDA

WEEK OF JANUARY 4, 1982

REFERRED FROM : HEARING BUREAU

820002

NEW YORK LL 585
Brown Forman Distillers Corp.
555 Madison Avenue
New York, New York 10022

REASON FOR REFERRAL

1. Filed affirmations
Sec. 101-b.3(d)

MP: Revocation

To be considered with Index #820003.

- NOTES: 1. Licensee's attorney had until January 4, 1982 to submit controversion.
2. This proceeding was commenced by notice dated May 22, 1981 and the hearing was completed on October 27, 1981. The minutes were delivered on November 23, 1981 and Hearing Officer Aubry submitted his report on December 16, 1981.

The Members of the Authority at their regular meeting held at the Zone I New York Office on February 3, 1982 determined:

A105

*Exhibit 6—Memorandum Decision of
State Liquor Authority*

Hearing Officer's findings adopted and charge sustained.

The appropriate penalty is 10 days deferred plus a \$20,000 bond claim.

The Members of the Authority in imposing this penalty have taken into consideration the fact that the licensee has not been suspended or received any other adjudicated penalty within the past five years.

Chairman McLaughlin, Comms. Marins and Flynn present and voting for the above. Comm. Doyle present and voting for cancellation plus a \$20,000 bond claim.

/s/ BARBARA JOANSI LORD
SECRETARY TO THE AUTHORITY

1-2-4-5
BJL:jb

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DO NOT REMOVE**

A106

**Exhibit 7—Final Determination of State Liquor
Authority—2/5/82**

STATE OF NEW YORK

**EXECUTIVE DEPARTMENT
DIVISION OF ALCOHOLIC BEVERAGE CONTROL**

Twin Towers	250 Broadway	125 Main Street
Suite 1806	New York, N.Y.	Buffalo, N.Y.
99 Washington	10007	14203
Avenue		
Albany, New York		
12210		

STATE LIQUOR AUTHORITY

February 5, 1982

Brown Forman Distillers Corporation
Brown Forman Dist., Import Co.
Early Times Distillery Co.
One North Broadway
White Plains, New York 10601

Serial No. WESTCHESTER LL 1009
ORDER OF SUSPENSION
DEFERRED WITH BOND CLAIM
IN THE AMOUNT OF \$20,000

Dear Sir:

At the meeting held on Feb. 3, 1982, in connection with proceedings to suspend, cancel or revoke your license, the Members of the Authority sustained the charge(s) contained in the Notice of Hearing dated May 22, 1981, served upon you, and determined that the appropriate penalty would be the suspension of your license for 10 days and the payment of the bond filed herein to the extent of \$20,000.00.

A107

*Exhibit 7—Final Determination of State Liquor
Authority—2/5/82*

However, in the discretion of the Members of the Authority, it was ordered that the service of the suspension be deferred subject to being imposed and put into effect within twelve months from the date hereof, in the event the Authority within its sole discretion is satisfied from information it receives or obtains that you have not taken practical precautions to assure the proper conduct of the licensed premises since the date of the above violation.

Notwithstanding the deferment of the suspension as directed above, you and the surety on your bond are required to pay the sum specified herein.

Very truly yours,

STATE LIQUOR AUTHORITY

/s/ EDWARD J. McLAUGHLIN
CHAIRMAN

CC: William B. Schreiber, Esq.
375 Park Avenue
New York, New York 10152

Certified by:

BARBARA JOANNI LORD

pj

Secretary to the Authority
WHOLESALE BUREAU
HISTORY CARD DIVISION

A108

*Exhibit 7—Final Determination of State Liquor
Authority—2/5/82*

STATE OF NEW YORK

EXECUTIVE DEPARTMENT
DIVISION OF ALCOHOLIC BEVERAGE CONTROL

Twin Towers	250 Broadway	125 Main Street
Suite 1806	New York, N.Y.	Buffalo, N.Y.
99 Washington	10007	14203
Avenue		
Albany, New York		
12210		

STATE LIQUOR AUTHORITY

February 5, 1982

Brown Forman Dist., Corp.
555 Madison Avenue
11th Floor
New York, New York 10022

Serial No. NEW YORK LL 585
ORDER OF SUSPENSION
DEFERRED WITH BOND CLAIM
IN THE AMOUNT OF \$20,000

Dear Sir:

At the meeting held on Feb. 3, 1982, in connection with proceedings to suspend, cancel or revoke your license, the Members of the Authority sustained the charge(s) contained in the Notice of Hearing dated May 22, 1981, served upon you, and determined that the appropriate penalty would be the suspension of your license for 10 days and the payment of the bond filed herein to the extent of \$20,000.00.

A109

*Exhibit 7—Final Determination of State Liquor
Authority—2/5/82*

However, in the discretion of the Members of the Authority, it was ordered that the service of the suspension be deferred subject to being imposed and put into effect within twelve months from the date hereof, in the event the Authority within its sole discretion is satisfied from information it receives or obtains that you have not taken practical precautions to assure the proper conduct of the licensed premises since the date of the above violation.

Notwithstanding the deferment of the suspension as directed above, you and the surety on your bond are required to pay the sum specified herein.

Very truly yours,

STATE LIQUOR AUTHORITY

/s/ EDWARD J. McLAUGHLIN
CHAIRMAN

CC: William B. Schreiber, Esq.
375 Park Avenue
New York, New York 10152

Certified by:

BARBARA JOANNI LORD

pj
Secretary to the Authority
WHOLESALE BUREAU
HISTORY CARD DIVISION

A110

Letter Noting Probable Jurisdiction

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 7, 1985

Macdonald Flinn, Esquire
White and Case
1155 Avenue of the Americas
New York, New York 10036

Re: 84-2030—Brown-Forman Distillers Corporation v.
New York State Liquor Authority

Dear Mr. Flinn:

The Court today entered the following order in the above case:

"In this case probable jurisdiction is noted limited to Question 2 presented by the statement as to jurisdiction."

Enclosed are memorandums describing the time requirements and procedures under the Rules. Inasmuch as this case will more than likely be scheduled for oral argument in January or February, extensions of time to file the joint appendix and briefs will not be favored.

I have been instructed to inform you that Rule 34.1(a) is satisfied by having the initial sheet in the brief state the "Questions Presented" without more. Counsel should not

A111

Letter Noting Probable Jurisdiction

print on this page the title of the case or any other descriptive matter.

The additional docketing fee of \$100.00 (Rule 45(a)) is now due and payable.

Very truly yours,

JOSEPH F. SPANIOLO, JR., CLERK

/s/ SANDY NELSEN
SANDY NELSEN
Assistant Clerk

APPELLANT'S BRIEF

DEC 2 1985

JOSEPH P. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States
October Term, 1984

BROWN-FORMAN DISTILLERS CORPORATION,
Appellant,
v.

STATE OF NEW YORK LIQUOR AUTHORITY,
Appellee.

On Appeal from the Court of Appeals
of the State of New York

BRIEF FOR APPELLANT

MACDONALD FLINN
Counsel of Record

OWEN C. PELL
1155 Avenue of the Americas
New York, New York 10036
(212) 819-8200

Attorneys for Appellant

WHITE & CASE
Of Counsel

December 2, 1985

BEST AVAILABLE COPY

451

Question Presented

New York's Alcoholic Beverage Control Law provides that liquor cannot be sold there unless the price to New York wholesalers is filed in advance and affirmed to be "no higher than the lowest price at which such item of liquor will be sold" elsewhere during the ensuing month for which the New York price "shall be in effect."

By prospectively setting a floor below which prices cannot be lowered anywhere else after the New York price has been established and conditioning the sale of liquor in New York upon compliance, do those provisions, on their face, violate the Commerce Clause by effecting (1) direct, extra-territorial regulation by New York of prices in every other state and (2) simple economic protectionism which, by distorting free competition, confers a benefit upon local economic interests at the expense of those in other states, insuring New York the lowest prices anywhere and establishing minimums below which prices cannot fall in any other state? If so, a subsidiary issue is whether the Twenty-first Amendment saves such regulation.

Designation of Parties

The appellee is identified in the caption appearing on the cover and at page one of this statement. Parent, subsidiary or affiliate companies of the appellant, Brown-Forman Distillers Corporation, are:

Brown-Forman Corporation
 Jack Daniel Distillery, Lem Motlow, Prop., Inc.
 Canadian Mist Distillers Ltd.
 Blue Grass Cooperage Company, Inc.
 The Jos. Garneau Co. S.A.
 Fratelli Bolla International Wines, Inc.
 Mt. Eagle Corporation
 Longworth, Ltd.
 Clintoek, Ltd.
 Southern Comfort Corporation
 Jack Daniel International, Inc.
 Thoroughbred Plastics Corporation
 Early Times Distillers Co.
 B-F Brands, Ltd.
 Lenox, Incorporated

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U.S. Const. Amend. XXI, § 2	3, <i>passim</i>

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§ 101-b, subd. 3(d) (McKinney 1970)	3 n.2, <i>passim</i>
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No. 84-2030

IN THE
Supreme Court of the United States
October Term, 1984

BROWN-FORMAN DISTILLERS CORPORATION,
Appellant,

v.

STATE OF NEW YORK LIQUOR AUTHORITY,
Appellee.

**On Appeal from the Court of Appeals
of the State of New York**

BRIEF FOR APPELLANT

Appellant, Brown-Forman Distillers Corporation ("Brown-Forman"), appeals from the final judgment of the New York Court of Appeals, dated April 2, 1985. The state court held that the lowest-price affirmation provisions of New York's Alcoholic Beverage Control Law do not violate the Commerce Clause of the United States Constitution either (1) by themselves and on their face or (2) as applied, in combination with other provisions of the affirmation law prohibiting discounts and allowances, by the appellee, State of New York Liquor Authority ("SLA"), to require Brown-Forman to sell to New York wholesalers at lower prices than those charged in all the other states with

affirmation requirements. As upheld by the state court, the SLA refused to allow Brown-Forman to pay lump sum promotional allowances to New York wholesalers and then ruled that those allowances violated the affirmation law by "effectively" lowering Brown-Forman's prices in the other affirmation states authorizing them. Unlike New York, none of those other states treats the allowances as price reductions.

This Court noted probable jurisdiction limited to the first question, *i.e.*, whether the New York affirmation statute, on its face, violates the Commerce Clause.

Opinions Below

The majority and dissenting opinions of the Court of Appeals are reported at 64 N.Y.2d 479, 490 N.Y.S.2d 128, 479 N.E.2d 764 (1985). They appear in the appendix to the Jurisdictional Statement at 1a and 13a.¹

The findings and determination of the SLA's hearing officer, adopted by the agency, are not reported but are included at J.S. App. 48a. The decision of the Appellate Division, First Department, of the New York State Supreme Court, upholding the constitutionality of the affirmation statute and confirming the SLA determination that Brown-Forman's allowances effectively reduced its prices in other states below the levels affirmed in New York, thereby rendering its affirmations false, is reported at 100 A.D.2d 55, 473 N.Y.S.2d 420 (1st Dep't 1984). The majority and dissenting opinions appear at J.S. App. 37a and 45a.

1. "J.S. App.," followed by a page number, refers to the appendix to the Jurisdictional Statement. "A.," followed by a page number, refers to the Joint Appendix filed herewith.

Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered on April 2, 1985, together with its order of remittitur of the record to the Supreme Court, New York County. J.S. App. 35a. The notice of appeal was filed on June 21, 1985. J.S. App. 55a.

This appeal was docketed in this Court within 90 days from the entry of that final judgment below. Jurisdiction is invoked under 28 U.S.C. § 1257(2).

The Court noted probable jurisdiction on October 7, 1985, solely with respect to the question whether the New York affirmation statute, on its face, violates the Commerce Clause. 106 S. Ct. 55 (1985); A.110.

Constitutional Provisions and Statutes

U.S. Const. Art. I, § 8, cl. 3:

The Congress shall have Power . . . To regulate Commerce with foreign Nations and among the several States. . . .

U.S. Const. Amend. XXI, § 2:

The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

The pertinent provisions of the New York Alcoholic Beverage Control Law² ("ABC Law") appear at J.S. App. 52a.

2. 1967 N.Y. Laws ch. 798, §§ 1-4; N.Y. Alco. Bev. Cont. Law § 101-b (McKinney 1970).

Statement

Brown-Forman produces and imports distilled spirits. It sells its products in interstate commerce to independent wholesalers in more than 30 states, including New York. Brown-Forman also sells its brands to the so-called "control states," where the state itself conducts the business in wine and/or spirits by performing the wholesale or retail functions.

The SLA Charges and Determination and Their Statutory Basis

As a prerequisite to selling liquor there, New York's ABC Law requires a supplier to file a schedule with the SLA specifying for each brand and size the bottle and case price to be charged to wholesalers in New York in the succeeding month. ABC Law, § 101-b, subd. 3(a); J.S. App. 52a-53a.

A lowest-price affirmation provision requires the supplier to affirm that the price filed is "no higher than the lowest price at which such item of liquor will be sold" anywhere else during the month for which the New York price "shall be in effect."³ In determining "the lowest price for which any item of liquor" is sold elsewhere, "appropriate reductions shall be made to reflect . . . all

3. The original New York affirmation statute was enacted in 1964. 1964 N.Y. Laws ch. 531, §§ 7, 9. It required that the price posted be "no higher than the lowest price at which such item of liquor was sold" anywhere else during the *preceding* month. See generally, *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 39-40, 54-55 (1966). In 1967, the statute was amended and the present prospective regulation of prices in the following month was adopted.

rebates, free goods, allowances and other inducements of any kind whatsoever" given to any wholesaler "purchasing such item" elsewhere.⁴ ABC Law, § 101-b, subds. 3(d), (g); J.S. App. 53a-54a.

In 1979, Brown-Forman began granting lump sum promotional allowances in other affirmation states but not in

4. Thirty-nine states have some form of lowest-price liquor requirement. Eighteen control states purchase all the distilled spirits to be distributed and consumed within their respective borders (Alabama, Idaho, Iowa, Maine, Michigan, Mississippi, Montana, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming). The control states use a standard contract provision (often called "the Des Moines Warranty") in which distillers or other suppliers selling to those states guarantee that the price will be no higher than the lowest price quoted anywhere else in the United States. Twenty-one other so-called "affirmation states" require by law that liquor sold to wholesalers there must be sold at a price no higher than the lowest price offered anywhere else in the United States. In addition to New York, the other affirmation states are Arizona, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Jersey, Oklahoma, Rhode Island, South Carolina, South Dakota and Tennessee.

Among the affirmation states, however, the time reference for determining the lowest price charged in any other state varies. Some states require (as did the original New York affirmation statute) that the affirmed price be no higher than the lowest price which *was previously* charged for that item anywhere in the United States. See, e.g., Ariz. Rev. Stat. Ann. § 4-253A (Supp. 1985). Other affirmation states require that the affirmed price be no higher than the lowest price which *is* charged anywhere in the United States. See, e.g., Cal. Bus. & Prof. Code § 23673 (Supp. 1985); Del. Code Ann. tit. 4, § 508(a) (1974); La. Rev. Stat. Ann. § 26:370 (B) (West 1975); Minn. Stat. § 340.114, subd. 3 (Supp. 1985).

Finally, the remaining affirmation states, including New York, require that the affirmed price be no higher than the lowest price which *will be* charged anywhere else in the United States. See, e.g., Fla. Stat. Ann. § 565.15(1) (West Supp. 1985); Hawaii Rev. Stat. §§ 281-122, 281-123 (West Supp. 1984); R.I. Gen. Laws § 3-6-14.1 (1976). For a recent compilation of relevant statutes and background concerning liquor price statutes, see Brief for the Plaintiff at 8-9, 12-20, 1a-34a, *Pennsylvania v. Alabama*, No. 101 Original, Oct. Term, 1984.

New York, because the SLA held that they were prohibited by other provisions of the ABC Law.⁵ The SLA then instituted a license revocation proceeding against Brown-Forman even though its affirmed prices in New York were identical to those affirmed elsewhere and were its lowest prices anywhere. The SLA charged that the allowances "effectively caused the price of [Brown-Forman] brands of liquor to wholesalers in these other states to be lower than the price to wholesalers in New York State." J.S. App. 48a-50a.

After a hearing and upon a stipulated fact record, the SLA's hearing officer, in a determination adopted by the agency, sustained those charges.⁶ The agency disclaimed

5. Brown-Forman's allowances are part of a marketing and promotional program with its wholesalers which was approved by the Bureau of Alcohol, Tobacco & Firearms ("BATF") in 1978. As Brown-Forman argued below, the allowances are in fact compensation for promotional services furnished to maximize sales of its overall line. As required by the BATF, the allowances are not tied to any particular brand or item and their amount, committed for an entire year, is unrelated to and does not vary with the number of cases purchased or not purchased by the wholesalers in other states who receive them. There is no requirement, agreement or understanding that the allowances advanced will be used for any particular Brown-Forman brand or for any particular type of promotional activity by the wholesaler. Each wholesaler makes the determination as to what brands, if any, the extent to which, how and when the money advanced will be used. Following the BATF approval, Brown-Forman implemented the allowances in other affirmation states, none of which treated them as price reductions or discounts lowering the affirmed price there or in any other state. A.87-A.101.

6. Specifically, the hearing officer found that the annual lump sum promotional allowances paid by Brown-Forman to "wholesalers in other states effectively caused the price of [Brown-Forman] brands of liquor to wholesalers in these other states to be lower than the price to wholesalers in New York State" and that it was "immaterial" that they are not related to any particular brands. J.S. App. 50a. There was no

(footnote continued on next page)

authority to determine Brown-Forman's contention that sustaining the charges would unconstitutionally burden interstate commerce in violation of the Commerce Clause. J.S. App. 51a.

The Decision of the Court of Appeals

Brown-Forman instituted a proceeding to review and annul the SLA decision. Brown-Forman ultimately appealed to the state Court of Appeals, urging that, as applied by the SLA, the affirmation statute unreasonably burdened interstate commerce in violation of the Commerce Clause and was also unconstitutional on its face. The Court of Appeals, as the highest court of New York, sustained the constitutionality of the statute. J.S. App. 1a.

The state court rejected Brown-Forman's argument that neither the Commerce Clause nor the Twenty-first Amendment allows New York to regulate liquor prices extraterritorially by imposing prospectively upon other states the minimum prices affirmed in New York. The court denied the claim of facial unconstitutionality, because it

specification of which brands were thus "effectively" lowered in price or by how much. J.S. App. 50a-51a.

In adopting the hearing officer's findings, the SLA failed to specify how the allowances could be allocated to specific Brown-Forman brands or otherwise be reflected in acceptable, lower, price affirmations. Moreover, the Authority, wholly ignoring the implications of its decision, failed to recognize that its ruling would extend extraterritorially from New York to all other affirmation states. Were Brown-Forman to lower its New York prices to whatever level the SLA would find acceptable, the "lowest price" statutes of the other affirmation states would require identical reductions. Based on the SLA's reasoning, however, if Brown-Forman continued offering allowances in other states another cycle of price reductions would be necessary. The only way Brown-Forman could avoid this never-ending cycle caused by the SLA's ruling would be to stop all the allowances everywhere.

concluded (1) that the New York affirmation statute was not intended to discriminate against out-of-state business or to increase New York sales and tax revenues and (2) that its impact on commerce is slight. On that basis, the majority distinguished *United States Brewers Ass'n, Inc. v. Healy*, 692 F.2d 275 (2d Cir. 1982), *aff'd mem.*, 464 U.S. 909 (1983). J.S. App. 5a-10a.

Summary of Argument

As a condition to selling liquor to wholesalers in New York, its affirmation statute requires the commitment of suppliers not to sell during the following month in any other state at a price lower than that posted in New York. On the face of the statute, that prospective, extraterritorial regulation of prices in other states directly burdens interstate commerce in violation of the Commerce Clause.

One state may not regulate the conduct of business in another. Such control of wholly out-of-state transactions is the *direct* regulation of interstate commerce; it is prohibited even if no protectionist or discriminatory objective is intended by the regulating state. As evidenced by the landmark precedent of *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), extraterritorial regulation is particularly offensive where price is the element controlled.

New York's prospective affirmation requirement inevitably controls liquor prices in the other states and restrains price competition nationally. It establishes a single, uniform minimum or floor below which a supplier cannot reduce its price in any other state or local market,

regardless of the competitive exigencies unique to each area.

The lowest-price affirmation and warranty requirements of 38 other states compound the adverse impact of New York's statute. Suppliers cannot experiment with or respond to local price competition in any state without incurring the cost of reducing their prices on their aggregate sales in all of the affirmation and warranty states where they do business. Similarly, although demand and other ingredients of competition differ from area to area and time to time, suppliers cannot reduce their prices in response to the competitive forces unique to each particular place and time without simultaneously reducing their prices everywhere that the affirmation concept governs.

The economically coercive effect of potential exclusion from all of those states deprives consumers everywhere of the benefits of price competition which could otherwise accrue to them. Affirmation builds a single, interlocking and rigid floor under prices nationwide. Price variations responsive to local market forces are destroyed, and artificial price amalgams prevail in every market in lieu of the prices which free competition would elicit in any market.

The New York affirmation statute also runs afoul of the Commerce Clause because it inherently effects "simple economic protectionism," whether or not that is its purpose. State regulation which benefits local economic interests at the expense of those in other states is unconstitutional. That principle controls even though the local benefit is only price equality and even though in-state, as well as out-of-state, business is evenhandedly subject to the same regulation. *Baldwin v. Seelig, supra*.

The objective of the New York affirmation statute is purely economic—to insure the lowest liquor prices for its residents. Unless suppliers comply with that requirement, New York barricades their brands. Such regulation is repugnant to the fundamental tenet of the Commerce Clause that business and consumers in every state are to have access to interstate commerce and to enjoy the benefits of free competition, unrestricted by the regulation of any state. Using access to its markets as the lever, the New York affirmation requirement distorts competition for the benefit of New York residents and at the expense of those in other states.

New York demands a free ride on the lowest price anywhere. Instead of prices determined for its residents by normal competitive processes responsive to its particular market forces, New York coercively imposes upon suppliers the artificial, blended price which its extraterritorial regulation forces upon all the other states. In thus negating free competition as the determinant of prices, New York's regulation is no different in principle than if New York demanded lower prices than those charged anywhere as the condition to selling in its important markets.

While displacing competition for the benefit of its residents, New York's affirmation requirement also strips those in all the other states of the economic advantages which the competitive forces of their particular markets could otherwise fashion. New York imposes upon them a single, uniform, national minimum price. Such economic protectionism is virtually *per se* in violation of the Commerce Clause.

As the Second Circuit held in *United States Brewers Ass'n, Inc. v. Healy*, 692 F.2d 275 (2d Cir. 1982), summarily affirmed by this Court (464 U.S. 909), the decision in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966), upholding New York's original historic or retrospective affirmation statute, is clearly distinguishable. Because it required only that New York prices must be no higher than the lowest price anywhere else during *the preceding month*, this Court, in rejecting a purely facial challenge to that pioneer statute, recognized in *Seagram* that such an affirmation requirement (1) controlled prices only in New York; (2) did not interfere with competition by forcing suppliers to adhere prospectively in other states to minimums fixed by New York's posting and affirmation obligations; and (3) fell within the authority granted to the states by the Twenty-first Amendment to regulate intoxicants destined for use, distribution or consumption within their own borders since it did not extraterritorially regulate prices in other states.

Nothing in the Twenty-first Amendment or the Court's decisions applying it allows any state to regulate liquor sales or prices in other states, as New York's prospective affirmation statute, amended after *Seagram*, now does. To allow New York to effect such extraterritorial regulation infringes upon the power granted by the Amendment to all the other states to control the traffic in alcoholic beverages within their own territories. Furthermore, the Twenty-first Amendment fails to save New York's affirmation statute for the additional reason that the object of that statute is solely economic, not the promotion of temperance or any other purpose of the Amendment.

ARGUMENT

I

ON ITS FACE, THE NEW YORK AFFIRMATION STATUTE VIOLATES THE COMMERCE CLAUSE

A. By Extraterritorially Establishing Minimum Prices For The Sale Of Liquor In Every Other State As The Condition For Selling In New York, The Statute Directly Restrains Interstate Commerce And Is Unconstitutional Regardless Of Any Pro- tectionist Or Discriminatory Intent

The New York liquor affirmation statute prospectively controls the prices at which liquor may be sold in all of the other states. As a condition to selling to New York wholesalers (regardless of where the sale or delivery takes place), a supplier must affirm that for the ensuing month its posted price for such sales will be no higher than the lowest price it will charge anywhere else. J.S. App. 52a-53a. New York thus mandates that the supplier cannot lower that price in any other state; it extraterritorially imposes the New York price as the minimum everywhere—a floor below which the supplier's price cannot be reduced or discounted anywhere.

The Commerce Clause prohibits any state from directly regulating the conduct of business in any other. Such extraterritorial regulation is unconstitutional, whether that is its purpose or merely its effect. This Court has applied that principle with particular emphasis where the extraterritorial regulation has controlled the prices charged in transactions outside the borders of the regulating state.

In an opinion in which three other Justices joined, Justice White recently revisited the principle of extraterritoriality. In *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), an Illinois statute restricting takeover offers for any corporation in which ten percent of the subject securities were owned by shareholders of that state was held to be facially violative of the Commerce Clause. Justice White concluded that, unlike "blue-sky" laws, which regulate only transactions within the regulating state, the Illinois statute was an unconstitutional *direct* regulation of interstate commerce, because its effect was also to regulate transactions wholly outside Illinois:

The Commerce Clause . . . permits only *incidental* regulation of interstate commerce by the States; direct regulation is prohibited.

* * *

The Illinois Act differs substantially from state blue-sky laws in that it directly regulates transactions which take place across state lines, even if wholly outside the State of Illinois.

* * *

It is therefore apparent that the Illinois statute is a direct restraint on interstate commerce and that it has a sweeping extraterritorial effect The Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.⁷

457 U.S. at 640-43 (emphasis in original).

7. Justice White's opinion also stated, "In *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 775 (1945), the Court struck down on Commerce Clause grounds a state law where the 'practical effect of such regulation is to control [conduct] beyond the boundaries of the state'" 457 U.S. at 643 (brackets in original).

Shafer v. Farmers Grain Co., 268 U.S. 189 (1925), examined North Dakota's regulation of local wheat sales, adopted to foster the business of growing and selling wheat in that state. The Court held that the regulations, including those prohibiting resale outside the state at prices yielding unreasonable profits, violated the Commerce Clause ("a state statute which by its necessary operation directly interferes with or burdens [interstate] commerce is a prohibited regulation and invalid, regardless of the purpose with which it was enacted"). 268 U.S. at 199.

Similarly, a Rhode Island utility order setting electricity rates not only there but for sales into Massachusetts was impermissible under the Commerce Clause, even though it was designed to protect local consumers from bearing more than their fair share of production costs and having to pay higher prices. The Court held that "the imposition of a direct burden upon interstate commerce . . . must necessarily fall, regardless of its purpose." *Public Utilities Comm'n v. Attleboro Steam & Electric Co.*, 273 U.S. 83, 89 (1927).

In *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), the New York Milk Control Act established minimum prices to be paid to in-state producers. The statute prohibited the resale in New York of imported milk, available in Vermont at lower prices, unless the price paid out-of-state was at least as high as the minimum required by New York for its producers. In addition to finding that this system offended the Commerce Clause because of its protectionist purpose and effect, the Court also concluded that the extraterritorial regulation of prices in transactions outside New

York was unconstitutional. Justice Cardozo's opinion states:

New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there New York is equally without power to prohibit the introduction within her territory of milk of wholesome quality acquired in Vermont, whether at high prices or at low ones.

* * *

It is one thing for a state to exact adherence by an importer to fitting standards of sanitation before the products of the farm or factory may be sold in its markets. It is a very different thing to establish a wage scale or a scale of prices for use in other states, and to bar the sale of the products, whether in the original packages or in others, unless the scale has been observed.

294 U.S. at 521, 528.

The New York affirmation statute necessarily suffers from the same defect. When a brand price is posted in New York, that price thereafter is thrust upon all sales made by the supplier outside New York as the minimum. For the period that price is in effect in New York, it cannot be reduced anywhere; discounts, allowances or rebates cannot be given anywhere; and, as the SLA determined¹ in its license revocation proceeding against Brown-Forman, even lump sum allowances not tied to any particular brand are deemed to violate the New York affirmation requirement if given elsewhere (although at the same time New York prohibits granting such allowances to its wholesalers).

Such extraterritorial regulation of business conducted wholly outside New York's boundaries is an impermissible

direct burden upon commerce. That such regulation was not intended to be protectionist or to discriminate against interstate commerce will not validate it.

The extraterritorial impact of New York's prospective affirmation requirement necessarily restricts liquor price competition across the nation. There is no single, uniform, homogeneous national liquor market. Brands sold, consumer preferences, seasonal characteristics, distribution costs, advertising and promotion, taxes, the character of retail outlets, and a host of other competitive forces vary markedly from state to state and even from market to market within a state. New York's lowest-price affirmation requirement, imposed as the condition to selling in its high volume, prestige markets, effectively sets a single minimum price in all 50 states, even in those which eschew affirmation. Such extraterritorial regulation destroys price responses or initiatives tailored to the particular competitive elements unique to each local or state market.

Each year, therefore, billions of dollars of liquor sales are subject to a monolithic, uniform and inflexible price regulation which establishes everywhere an identical floor below which prices cannot respond to free market forces. Consumers everywhere are deprived of the benefits which competition could otherwise bestow upon them.

When viewed against the similar lowest-price liquor requirements of the 20 other affirmation states and 18 control states with contractual warranties, the forbidden extraterritorial effect of New York's requirement is compounded. The coercive economic consequences of exclusion from all those states further diminish the ability of

distillers or suppliers to engage in price competition beneficial to consumers.

Suppliers selling in more than one affirmation state are impeded from meeting or responding to the lower price levels, price reductions, discounts or allowances offered by intrastate or regional competitors which sell their brands in only one or no affirmation state. To respond, a supplier subject to affirmation in several states must be willing and able to absorb the cost of simultaneously lowering its price across the board on its aggregate sales in all the affirmation states where it does business. The magnitude of that cost, increased by the number of affirmation states in which the supplier does business and its volume in each, can force a decision to forsake any competitive response.⁸ The competitor, free of affirmation, has no such concern.

The interest of consumers is thus sacrificed in those markets or states where the competitor not bound by affirmation elsewhere does business. The cost to consumers resulting from such inhibition of free competitive response, however, is likely to be far greater. Typically local market reductions in price, whether initiated by a seller seeking to improve its competitive position by price experimentation or stimulated by the price foray of a competitor, tend to spread to other (even all) markets and benefit consumers on an increasingly broader scale. Affirmation, therefore, hurts consumers on a multi-market, if not national, basis by stifling price competition.

Consumers are also harmed because the demand for particular types of spirits and for given brands varies

8. The same considerations prevent local price initiatives or experimentation by suppliers subject to the affirmation sanctions of a number of states.

tremendously from area to area and time to time. For example, bourbon whisky is in substantial demand in certain regions but has little consumer call in others. Seasonal change also significantly influences what spirits are consumed. In cold climate markets, demand for those consumed in warm weather beverages burgeons in the summer. If determined by the elements which forge prices in competitive markets, the variations in demand for liquor would produce price reductions differing from state to state and time to time. Affirmation, however, eliminates such price change, because any supplier selling in several affirmation states must disregard individual local market competitive forces and adopt a uniform, blended price everywhere, even though it may not be the price which free competition would dictate anywhere.

B. The Statute Is Also Protectionist And Discriminates Against Interstate Commerce

Where a state's direct regulation of interstate commerce consists of extraterritorial interference with the prices charged in transactions wholly outside its borders, that forbidden restraint generally, if not inevitably, protects the purely economic interests of the regulating state. Such protectionism inheres in New York's affirmation requirement; it is an additional, compelling basis for finding that the regulation violates the Commerce Clause.

"[W]here simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected."⁹ *Philadelphia v. New Jersey*, 437 U.S. 617,

9. Unconstitutional economic protectionism may be shown by "proof either of discriminatory effect . . . or of discriminatory purpose . . ." *Minn. v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 n.15 (1981); *Bacchus Imports, Ltd. v. Dias*, 104 S. Ct. 3049, 3055 (1984).

624 (1978). Protectionist regulation (like any other direct restraint) is denied the more flexible approach articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (where state regulation applies evenhandedly to in-state and out-of-state businesses to effect a legitimate local interest and any restraint upon commerce is only incidental, a balancing of the local benefit against the extent of the burden on interstate commerce may be undertaken).

Whenever a state's regulation confers a benefit upon local economic interests and discriminates against business or residents in other states—even where the benefit is merely price equality—that regulation is "protectionist." More specifically, a state cannot erect barriers at its borders to the movement of goods in interstate commerce (whether imports or exports) where either the purpose or effect is to benefit its residents by changing or tampering with the economic environment which free competition would otherwise determine. It matters not that the protectionist regulation is non-discriminatory in the sense that it applies evenhandedly to the business of residents of the regulating state as well as non-residents.

In *Buck v. Kuykendall*, 267 U.S. 307 (1925), a Washington resident was denied a permit by his own state to operate as a common carrier between Seattle and Portland, Oregon. The controlling statute authorized that denial where there was existing, adequate service. Holding this prohibition of competition a protectionist regulation, forbidden by the Commerce Clause, Justice Brandeis stated:

[A]ppropriate state regulations adopted primarily to promote safety upon the highways and conservation in their use are not obnoxious to the Commerce Clause,

where the indirect burden imposed upon interstate commerce is not unreasonable The provision here in question is of a different character. Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition.

267 U.S. at 315 (citations omitted).

H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949), is but one of the decisions demonstrating that state regulation of interstate business which, in purpose or effect, alters the competitive status is unconstitutional economic protectionism. There New York required a license to purchase from New York milk producers. A Massachusetts processor was denied a license to purchase New York milk which it would have exported, processed and sold to Massachusetts consumers. In denying the license, New York sought to insure lower prices for its processors and consumers by eliminating the additional out-of-state competition for milk produced in New York—competition which, if permitted, would reduce the volume available and thereby increase the cost to New Yorkers.

Declaring that a state “may not promote its own economic advantages by curtailment or burdening of interstate commerce,” Justice Jackson wrote:

This distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law.

• • •

Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any.

336 U.S. at 533, 539.

More recently the Court again overturned restrictions upon exports, the purpose and effect of which were to reserve for New Hampshire's citizens the economic benefit of lower-cost hydroelectric power generated there. A utility was required to sell such power only to residents or, alternatively, to sell comparable quantities produced elsewhere at special, lower rates. *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982). Concluding that the regulation provided an economic advantage for New Hampshire consumers at the expense of those in neighboring states and also directly burdened commerce, the Court held, “Such state-imposed burdens cannot be squared with the Commerce Clause when they serve only to advance ‘simple economic protectionism.’ ” 455 U.S. at 339.

In *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), the Court overturned New York's milk regulation as economic protectionism. To sell milk in New York, dealers were required to purchase it at a price no lower than that established for New York dairy farmers. The requirement did not discriminate by applying only to milk imported from other states; milk produced in New York, too, could not be sold there if it had been purchased for less

than the established minimum. Nevertheless, the Court held the New York statute unconstitutional, because it conditioned sales of imported milk upon the requirement that the price paid out-of-state must be no lower than the minimum mandated by New York. Similarly, but even more egregiously because it universally controls prices not just on sales destined for New York but on all transactions everywhere, New York's affirmation law conditions the sale of liquor in New York upon its being sold everywhere else at no lower price than that posted in New York.

Although the milk statute in *Seelig* required only "a parity of prices between New York and other states" and merely regulated "by indirection the prices to be paid to producers in another [state]" (294 U.S. at 524), it failed to satisfy Commerce Clause standards. It protected the purely economic interests of New York by neutralizing economic advantages belonging to the state of origin and insulating the milk trade in New York from the effects of free competition. Justice Cardozo stated:

Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.

294 U.S. at 522.

Characterizing such regulation as economically motivated "price security" designed to promote the commercial welfare of New York dairy farmers, and declaring that it is an "ultimate . . . principle that one state in its dealings with another may not place itself in a position of economic isolation" (294 U.S. at 527), the Court struck down the New York regulation.¹⁰

Here, the New York Court of Appeals found (J.S. App. 7a, 9a) that New York's interest in enacting its affirmation statute is to achieve the economic advantages of lower prices for its consumers. The New York Legislature declared this policy in the omnibus enactment which included affirmation: "consumers of alcoholic beverages in [New York] should not be discriminated against or disadvantaged by paying unjustifiably higher prices for brands of liquor than are paid by consumers in other states." 1964

10. In *Schwegmann Bros. Giant Super Mkts. v. Louisiana Milk Comm'n*, 365 F. Supp. 1144 (M.D. La. 1973), *aff'd*, 416 U.S. 922 (1974), markedly similar regulations were overturned. The district court cited *Seelig* for the proposition that "a state may not, through a law fixing minimum prices on milk and milk products for the purpose of securing an adequate supply of wholesome milk for its inhabitants, neutralize an economic advantage possessed by a neighboring state by imposing its minimum price standards on the products purchased in that neighboring state." 365 F. Supp. at 1154. The same rationale was applied in *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333 (1977), a case involving a non-price regulation. The Court held that, even if North Carolina had no economic protection motive and although its statute was facially neutral in applying to all apples without regard to their origin, the practical effect of its exclusion of apples from Washington and other states if identified by the superior grading systems of those states was not only to burden interstate sales of Washington apples but also to discriminate against them. The effect of the statute was the "stripping away [of Washington's] competitive and economic advantages" and a "leveling" which operated to the advantage of local apple growers, because "with free market forces at work, Washington sellers would normally enjoy a distinct market advantage" 432 U.S. at 351-52.

N.Y. Laws ch. 531, § 8. See, also, *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 38-40 (1966).

The New York liquor affirmation statute restricts and erects barriers to the movement of that commodity in interstate commerce. Solely for the purpose of insuring the lowest prices for New York consumers, the statute requires suppliers to post prices for the ensuing month and to affirm that thereafter they will not sell at a lower price anywhere else. Unless they comply, their brands cannot be sold in New York. This prospective regulation of the prices charged in every other state in transactions wholly outside New York's borders, as the condition to selling in New York, is discriminatory, economic protectionism.

Seelig and this Court's other decisions make it clear that discrimination, in the sense that out-of-state goods are treated differently from those originating in-state, is not a prerequisite to finding the proscribed economic protectionism. Similarly, such a finding cannot be avoided because a regulation merely effects price equality or parity.

While *Seelig* invalidated the regulation of imports which discriminated against Vermont producers, stripping them of their competitive advantage in order to insulate New York from lower-price competition, the rule against discriminatory, economic protectionism should be no less applicable here. Thus, in *New England Power*, the unconstitutional discrimination was New Hampshire's mandating of lower prices for its consumers at the expense of those elsewhere, negating whatever competition an unrestricted, free flow of commerce could have produced. Discriminatory economic protectionism exists whenever a state ob-

structs the flow of goods into or out of its territory with the purpose or effect of conferring a competitive benefit upon its residents at the expense of those in other states.

For the benefit of its residents and to the disadvantage of businesses and consumers in other states, New York's prospective affirmation requirement subverts the Commerce Clause principle of free competition. Affirmation assures New York economic interests the lowest prices anywhere, whether justified by the character of the competition there or not. New York's affirmation requirement and prospective control of prices everywhere else usurp for it the best price anywhere. New York arrogates to itself a free ride on the most competitive price anywhere, whether or not the competitive environment in New York would produce that price. As a matter of economic logic, requiring a more favorable price than free competition would produce is not different in principle than demanding a discriminatory discount as the condition to selling in New York, contrary to the teaching of *Seelig*, *New England Power*, and this Court's other decisions summarily striking down economic protectionist state regulation.

New York's affirmation requirement also deprives those in other states of any lower prices which the forces of free competition unique to their markets could produce, thus neutralizing or destroying their economic advantages. Although the lower-price Vermont producers in *Seelig* were restricted from realizing their competitive advantage only in New York, here New York's statute deprives wholesalers, retailers and consumers in every other state of the competitive advantages which could accrue to them in their markets but for New York's imposition of a minimum price level on transactions outside its borders.

In addition, absent New York's protectionist interference with the prices otherwise determined by the differing competitive forces prevailing in each state or local market, many of New York's residents and those of neighboring states would be free to purchase liquor across state lines, availing themselves of the lowest prices dictated by free competition.

In short, New York's regulation impermissibly distorts and interferes with free competition, unreasonably burdening the transaction of interstate business. The affirmation requirement is simple economic protectionism, virtually *per se* invalid under the Commerce Clause.

C. The Second Circuit, In *United States Brewers Ass'n v. Healy*, Correctly Held That A Prospective Affirmation Requirement Setting Minimum Prices In Other States Is Invalid, Extraterritorial Regulation Which Directly Burdens Commerce And That This Court's Decision In *Seagram v. Hostetter* Is Distinguishable

In 1981, Connecticut enacted a beer affirmation statute identical in effect to the New York liquor affirmation requirement at issue here.¹¹ The Court of Appeals for the Second Circuit determined that the Connecticut statute, on its face, imposed an unconstitutional burden upon inter-

11. The Connecticut statute required an affirmation that the price to wholesalers "will be no higher than the lowest price at which each such item of beer is or will be sold . . . to any wholesaler in any state bordering [Connecticut], at any time during the calendar month covered by such posting." Connecticut Liquor Control Act, 1981 Conn. Acts 294; Conn. Gen. Stat. Ann. § 30-63b(b) (West Supp. 1985). As amended in 1967, Section 101-b, subd. 3(d) of New York's ABC Law provides that prices to wholesalers here will be "no higher than the lowest price at which such item of liquor will be sold . . . to any wholesaler anywhere . . . at any time during the calendar month for which such schedule shall be in effect" J.S. App. 53a.

state commerce. This Court summarily affirmed. *United States Brewers Ass'n, Inc. v. Healy*, 692 F.2d 275 (2d Cir. 1982), *aff'd mem.*, 464 U.S. 909 (1983).

In accord with the decisions of this Court, the Second Circuit held that the extraterritorial effect of the Connecticut statute was an impermissible direct regulation of prices in other states. Citing cases discussed above, the court of appeals concluded:

If the purpose or effect of a state's law is to regulate conduct occurring wholly outside the state, the burden on commerce is generally held impermissible, and the fact that the law may not have been intended as protectionist or discriminatory will not save it Thus, it has been held repeatedly that where the practical effect of a state's legislation is to control conduct in *other* states, the regulation violates the Commerce Clause.

692 F.2d at 279 (emphasis in original).

Based upon those principles, the Second Circuit found the Connecticut "affirmation provisions on their face an impermissible burden on commerce, . . . [because they sought] to regulate prices not just in Connecticut but in its surrounding states as well." *Id.* at 282. Noting that once Connecticut prices were posted the statute—because "it was geared to the future"—effectively fixed minimum prices and precluded brewers from selling thereafter in other states at any lower prices, the court emphasized the prospective, extraterritorial effect of the Connecticut regulation:

[T]he extraterritorial thrust of the main beer price affirmation provisions . . . is plain, for those sections

prevent a brewer from selling below the Connecticut wholesaler price to any wholesaler in any neighboring state. In other words, these sections tell a brewer that for any given month when it sells beer to a wholesaler in Massachusetts, New York, or Rhode Island, it may not do so at a price lower than that it has previously announced it will charge to Connecticut wholesalers. As the district court succinctly described it,

“[b]ecause it is geared to the future, the Connecticut statute effectively sets minimum prices for the four-state area once the price is posted in Connecticut on the thirteenth of the month”

Thus, the obvious effect of the Connecticut statute is to control the minimum price that may be charged by a non-Connecticut brewer to a non-Connecticut wholesaler in a sale outside of Connecticut.

692 F.2d at 282 (citations omitted).

Based upon that analysis of the necessary effect of the statute, the Second Circuit, quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982), concluded that, insofar as the Connecticut statute burdened “out-of-state transactions, there is nothing to be weighed in the balance to sustain the law.” 692 F.2d at 284.

The *Healy* court clearly and persuasively distinguished *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966). There, solely on the face of the original New York affirmation statute enacted in 1964, this Court sustained the law’s constitutionality over claims that it impermissibly burdened interstate commerce. As it was then, the New York statute required only that any price posted must be “no higher than the lowest price at which such item of

liquor was sold” anywhere in the country during the preceding month.¹²

Thus, the original New York statute merely required the adoption there of prices previously determined elsewhere; it left suppliers free of any burden to adhere prospectively in other states to minimums extraterritorially fixed by New York’s posting and affirmation obligations. Consequently, it did not interfere with free competition the way New York’s amended, prospective affirmation requirements now do. This Court, therefore, recognized that the original statute regulated prices only within New York.¹³ On that basis, the Second Circuit concluded in *Healy* that *Seagram v. Hostetter* was not controlling as to the constitutionality of Connecticut’s affirmation statute:

The [original] New York statute differed significantly from the Connecticut statute, because, unlike Connecticut’s beer price affirmation provisions which control brewers’ future conduct in the states surrounding Connecticut, the New York law in *Seagram* merely required that New York prices reflect what had been charged elsewhere in the past. Thus, the New York

12. 1964 N.Y. Laws ch. 531, § 9. See, also, *Seagram*, 384 U.S. at 39-40, 54-55.

13. Noting that “the present case concerns liquor destined for use, distribution, or consumption in the State of New York,” the *Seagram* opinion declared,

We need not now decide whether the mode of liquor regulation chosen by a State in such circumstances could ever constitute so grave an interference with a company’s operations elsewhere as to make the regulation invalid under the Commerce Clause. See *Baldwin v. G.A.F. Seelig*, 294 U.S. 511. No such situation is presented in this case. . . . It is by no means clear . . . that § 9 must inevitably produce higher prices in other States . . . , rather than the lower prices sought for New York. It will be time enough to assess the alleged extraterritorial effects of § 9 when a case arises that clearly presents them.

384 U.S. at 42-43.

law, although it affected the prices that manufacturers would choose to set in other states, did not limit the freedom of a manufacturer at any given time to raise or lower prices in any other state.

692 F.2d at 283.

Emphasizing that this Court's decision in the *Seagram* case did not sanction any extraterritorial price regulation by New York of sales outside its borders,¹⁴ the Second Circuit stated:

We thus find in *Seagram* no indication that a state is permitted to control the prices at which liquor may be sold in other states, and we believe the *Seagram* Court's recognition that the New York statute regulated prices only within New York is highlighted by the Court's repeated references to *Baldwin v. G.A.F. Seelig, Inc.*

* * *

[N]othing in *Seagram* purports to rule that a state may achieve its goal of price-parity by the far more drastic, and clearly excessive, method of controlling the minimum prices at which liquor may be sold outside of its own territory.

692 F.2d at 283, 284.

14. *Seagram v. Hostetter* was decided before New York's pioneer affirmation statute led to the proliferation of such requirements in other states. That case might be decided differently today, because now more than twenty states have affirmation requirements. The interlocking effect of two or more historic or retrospective lowest-price statutes may directly burden interstate commerce. Thus, as long as more than one state has an affirmation statute requiring for the current month the lowest price charged anywhere else during the preceding or any earlier month, the price can never be raised in any such affirmation state without discontinuing sales in the other states for a month. Such an extraterritorial regulation of the right to do business and of the prices charged outside the regulating state's borders, based upon the precedents earlier discussed, would appear to be a direct burden upon commerce, impermissible under the Commerce Clause.

The Connecticut affirmation requirement was identical in its operation and effect to the current New York provisions, adopted after *Seagram*. Since its amendment in 1967, the New York statute has required an affirmation that the price posted will be no higher than "the lowest price at which such item of liquor will be sold . . . by any wholesaler anywhere . . . at any time during the calendar month for which such schedule shall be in effect . . ."¹⁵ New York, like Connecticut, has effectively set the minimum price which can be charged in other states once the New York price has been posted.

Just as *Healy* held that on its face "the Connecticut statute seeks to regulate prices . . . in its surrounding states as well" (692 F.2d at 282), so do the New York affirmation provisions, on their face, seek to regulate outside its borders by requiring future prices elsewhere to be no lower than a price posted in New York. The Second Circuit decision, therefore, is equally applicable to New York's present affirmation statute. That decision squarely supports the conclusion that the statute, on its face, unconstitutionally burdens interstate commerce in contravention of the Commerce Clause.

II

THE TWENTY-FIRST AMENDMENT DOES NOT SAVE THE NEW YORK AFFIRMATION STATUTE

A. The Twenty-first Amendment Does Not Authorize New York To Regulate Prices In Any Other State

This Court has, without exception, confined the scope of the Twenty-first Amendment to its literal language, *i.e.*, the "transportation or importation into any State . . . for

15. ABC Law § 101-b, subd. 3(d); J.S. App. 53a.

delivery or use therein . . .” U.S. Const. Amend. XXI, § 2. Regulation of liquor sales outside a state’s own boundaries is not within the authority delegated by the Amendment. See, e.g., *Capital Cities Cable, Inc. v. Crisp*, 104 S. Ct. 2694, 2707-09 (1984); *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 299 (1945). See, also, *United States v. State Tax Commission*, 412 U.S. 363, 373-78 (1973); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964); *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 538 (1938).¹⁶

In *United States Brewers Ass’n, Inc. v. Healy*, 692 F.2d 275 (2d Cir. 1982), *aff’d mem.*, 464 U.S. 909 (1983), the Second Circuit ruled that the Twenty-first Amendment did not permit Connecticut, with the enactment of its prospective beer affirmation statute, to establish minimum prices in any other state. The court concluded that, however much the Twenty-first Amendment may limit the constraints of the Commerce Clause which inhibit state regulation of other goods, the broad power to regulate alcoholic beverages granted by the Amendment extends only to those intoxicants destined for distribution or use within the state’s own borders. The Second Circuit unequivocally held:

Notwithstanding the greater scope permitted to the states for regulation of traffic in intoxicating beverages, nothing in the Twenty-first Amendment suggests that a state may regulate the sale of liquor outside of its own territory. . . . We are aware of no authority to the effect that the Twenty-first Amendment modifies the traditional Commerce Clause prin-

16. Cf. *Bacchus Imports, Ltd. v. Dias*, 104 S. Ct. 3049, 3060-61 (1984) (Stevens, J., dissenting).

ciples that bar a state from regulating the transport, sale or use of products outside of its own territory.

* * *

Nothing in the Twenty-first Amendment permits Connecticut to set the minimum prices for the sale of beer in any other state, and well-established Commerce Clause principles prohibit the state from controlling the prices set for sales occurring wholly outside its territory.

692 F.2d at 281, 282.

In *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966), the Court stated that where liquor was destined for use, distribution, or consumption in New York, “the Twenty-first Amendment demands wide latitude for regulation by the State.” 384 U.S. at 42. That emphasis upon distribution or use within New York both highlights the absence of extraterritorial price regulation in *Seagram* because of the historic or retrospective time frame of the original affirmation statute and confirms the limitation of the Amendment’s delegation of authority solely to regulation within New York.

Cases involving the scope of the Twenty-first Amendment require a “pragmatic effort to harmonize state and federal powers.” *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 109 (1980). When state liquor regulations reach beyond the state’s borders to transactions not occurring in, affecting, or destined for the regulating state, however, the federal interest in interstate commerce is paramount, if not exclusive. Were this not so, the Amendment effectively would repeal the Commerce Clause—a result expressly rejected by this Court. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S.

324, 331-32 (1964). On its face, New York's prospective affirmation law directly regulates liquor prices in all other states. New York's present statute regulates the prices charged in transactions outside of and not destined for New York. Such effects on commerce, beyond New York's borders, are not protected by the Twenty-first Amendment.

To hold to the contrary would allow New York, in the name of the Twenty-first Amendment, to undercut the exclusive authority delegated to all the states by that same Amendment. By imposing its extraterritorial control of prices upon the conduct of business in every other state, New York intrudes upon the Twenty-first Amendment powers of all those other states. Thus applied, the Amendment would be a weapon of offense in New York's hands, not the citadel against interference with each state's regulation of the liquor trade only within its own borders which was the purpose of the Amendment.

B. The Twenty-first Amendment Does Not Authorize New York To Violate The Commerce Clause, Because Its Affirmation Statute Is Designed Solely To Achieve Economic Ends And Not To Promote Any Purpose Of The Amendment

In *Bacchus Imports, Ltd. v. Dias*, 104 S. Ct. 3049 (1984), Hawaii contended that its protectionist and discriminatory tax exemption for locally produced spirits was protected by the Twenty-first Amendment. The Court rejected that contention, because such regulation was not designed to promote temperance or to carry out any other purpose of the Amendment. Justice White wrote:

The central purpose of the [Amendment] was not to empower States to favor local liquor industries by

erecting barriers to competition. It is also beyond doubt that the Commerce Clause itself furthers strong federal interests in preventing economic Balkanization. . . . State laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor. Here, the State does not seek to justify its tax on the ground that it was designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment, but instead acknowledges that the purpose was "to promote a local industry." . . . Consequently, because the tax violates a central tenet of the Commerce Clause but is not supported by any clear concern of the Twenty-first Amendment, we reject the State's belated claim based on the Amendment.

104 S. Ct. at 3058-59 (citations omitted).¹⁷

New York's prospective affirmation statute does not exist to promote temperance or any other purpose of the Amendment. Rather, the statute seeks only to reap for New Yorkers the lowest liquor prices.¹⁸ New York would accomplish this goal by controlling liquor prices in all other states regardless of the competitive forces in other markets. Whatever the scope of the Twenty-first Amendment, it was clearly not designed to protect such extraterritorial regulation. One state cannot be permitted to regulate the liquor prices of other states to benefit that state's consumers.

17. See, also, *Loretto Winery, Ltd. v. Gazzara*, 601 F. Supp. 850 (S.D.N.Y.), *aff'd*, 761 F.2d 140 (2d Cir. 1985) (discussing the history underlying the Twenty-first Amendment).

18. See, *supra*, at pp. 23-24. See, also, *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 38-40 (1966) (discussing the legislative intent of New York's original affirmation law).

Conclusion

For these reasons, the Court should hold the New York affirmation statute unconstitutional on its face because it contravenes the Commerce Clause, and should reverse the judgment of the Court of Appeals of New York (which affirmed the judgment of the Appellate Division, First Department, of the New York State Supreme Court, upholding the statute, confirming the appellee's determination, and dismissing Brown-Forman's petition for judicial review).

Respectfully submitted,

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APPELLEE'S BRIEF

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

BROWN-FORMAN DISTILLERS CORPORATION,

Appellant,

v.

STATE OF NEW YORK LIQUOR AUTHORITY,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF OF APPELLEE

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January 13, 1986

QUESTION PRESENTED

May New York insist, consistently with the commerce clause and the twenty-first amendment, that liquor prices to domestic wholesalers be as low as prices offered elsewhere in the country, as part of its regulatory scheme for the sale of liquor?

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STATEMENT OF THE CASE

Appellant has accurately stated the case as it relates to the only issue which is before the Court, *i.e.*, appellant's facial challenge to New York's lowest price affirmation law.

The bulk of appellant's statement, however, sets forth facts and circumstances relating to an issue which is not before this Court. That issue is the appellant's contention that the interaction between New York's lowest price affirmation statute, New York Alcoholic Beverage Control Law¹ ("ABC Law") §§ 101-b(3)(d),(g) and New York's statutory ban on liquor discounts, ABC Law § 101-(b)(2), J.S. App. 52a-53a,² burdened interstate commerce in a manner which rendered the affirmation law unconstitutional as applied. The Court has declined to hear that issue. 106 S.Ct. 55 (1985); A.110.

¹ Ch. 798, §§ 1-4 1967 N.Y. Laws (McKinney 1970) (codified at N.Y. Alco. Bev. Cont. Law § 101-b).

² References to the appendix to the Jurisdictional Statement are designated as "J.S. App.". References to the Joint Appendix are designated as "A."

SUMMARY OF ARGUMENT

New York's lowest price affirmation law, applicable to liquor, was enacted in reliance upon and conforms precisely to this Court's unanimous holding in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966) that "New York may constitutionally insist that liquor prices to domestic wholesalers... be as low as prices elsewhere in the country." 384 U.S. at 43.

The affirmation law regulates evenhandedly to effectuate a purpose already found legitimate by this Court. The law's alleged effect on interstate commerce, which is not demonstrated in the record, is incidental and not burdensome within the meaning of this Court's decisions. The law should be sustained on this basis alone.

Brown-Forman alleges that the affirmation law distorts a distiller's pricing decisions in other states even though thirty-eight other states have nearly identical lowest price affirmation policies. In this case New York's affirmation law is again challenged on its face upon the same commerce clause grounds asserted in *Seagram*. Once again the distiller's allegations are mere conjecture unsupported by any record. Indeed, Brown-Forman, which has lived within the national structure of state price affirmation policies for nearly a half-century, and supported the enactment of the law challenged here, commenced the proceedings below on a different legal theory. Brown-Forman raised the issue now before this Court for the first time in New York's intermediate appellate court. There is no reason presented in this case to disturb the holding in *Seagram*.

Even if the Court presumes the existence of the affirmation law's alleged effect, it would not constitute a burden within the meaning of the Court's decisions. The affirmation law is not protectionist. It does not directly regulate interstate commerce nor isolate New York from commerce. It has not impeded the flow of commerce whatsoever and treats in-state and out-of-state businesses in the same manner. It does not require any business to perform operations in the State which could be more efficiently performed elsewhere.

The validity of the law is further supported because it was enacted within the twenty-first amendment's central grant of power to the States. The law is an integral part of New York's comprehensive statutory scheme for regulating the importation and distribution of liquor in the state. When, as here, a state is effectively regulating within its twenty-first amendment powers, it is entitled to additional latitude under the commerce clause.

The type of injury Brown-Forman alleges, if cognizable at all, is a concern of competition. This type of concern is properly the subject of the antitrust laws, which are the repository of all the power the Constitution grants the federal government to deal with allegedly anticompetitive conduct. The affirmation law, however, does not violate the antitrust laws as interpreted by this Court. The Court could not vindicate Brown-Forman's claims without adopting standards under the commerce clause that are novel, illogical and divergent from those dealing with allegedly anticompetitive state action under the antitrust laws.

ARGUMENT

I. NEW YORK'S LOWEST PRICE AFFIRMATION LAW PRECISELY CONFORMS TO THE COURT'S UNANIMOUS HOLDING IN *JOSEPH E. SEAGRAM & SONS, INC. v. HOSTETTER* THAT "NEW YORK MAY CONSTITUTIONALLY INSIST THAT LIQUOR PRICES TO DOMESTIC WHOLESALESALE... BE AS LOW AS PRICES ELSEWHERE IN THE COUNTRY."

In 1964, New York became the second state to enact a law requiring that the prices distillers charge liquor wholesalers for liquor destined for sale within the state's borders be no higher than the lowest prices charged by those distillers anywhere in the United States.³ Kansas and New York were, in fact, the nineteenth and twentieth states to require lowest price parity. Eighteen "monopoly" states, those which control and sell liquor themselves, had for decades required distillers to warrant contractually that the states were buying from them at prices no higher than the lowest price charged in the United States.⁴

A. In *Seagram*, This Court Upheld New York's Original Affirmation Law Against A Distiller's Claim That It Was Facially Invalid Under The Commerce Clause.

The legislative history of New York's original lowest price affirmation statute is succinctly stated in this Court's unanimous opinion upholding the statute against a facial challenge to its

³ In 1961, Kansas had been the first state to enact a lowest price affirmation law. ch. 241, §§ 1, 2, 1961 Kan. Stat. Laws. See *Laird & Company v. Cheney*, 196 Kan. 675, 677, 414 P.2d 18, 20 (1966).

⁴ The monopoly states (sometimes referred to as "control" states) generally employ a provision referred to as "The Des Moines Warranty." This warranty requires suppliers of distilled spirits to affirm that the control state is being charged a price that shall not exceed the lowest price charged for a particular product anywhere in the United States. The warranty also requires that if any discounts or allowances are offered anywhere in the United States, they or their equivalent will be offered to the control state.

validity, a challenge that was grounded in the commerce clause,⁵ the antitrust laws⁶ and the equal protection and due process clauses of the fourteenth amendment. *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 38-41, 47 n.18 (1966) ("*Seagram*"). New York had determined that its previous system of mandatory resale price maintenance agreements had not only been ineffective as a temperance measure but also had encouraged anticompetitive and monopolistic practices. *Id.* at 39 & 47 n.18. It further determined that "New York liquor consumers had been the victims of serious discrimination" in prices, amounting to \$150,000,000 a year. *Id.* at 39 n.9. The court below found that "[t]he statute was enacted to end [this] discrimination against New York customers." J.S. App. 7a.

The original law required distillers to affirm that the prices being charged to wholesalers were no higher than the lowest prices charged anywhere in the United States in the *preceding* month, and it specifically included sales to monopoly states within this requirement. It was immediately challenged but was upheld by three levels of the New York courts⁷ and ultimately by this Court in *Seagram*. In rejecting the distillers' commerce clause challenge, the Court noted New York's legitimate interest in insuring equal pricing treatment for purchasers of liquor within the state:

The mere fact that [New York's law]⁸ is geared to appellants' pricing policies in other states is not sufficient

⁵ U.S. Const. art. I, § 8, cl. 3:

The Congress shall have Power ... To regulate Commerce with foreign Nations and among the several States ...

⁶ The statute was claimed to be inconsistent with the Sherman Act, 15 U.S.C. §§ 1 - 7 and § 2 of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. § 13.

⁷ 45 Misc. 2d 956, 258 N.Y.S.2d 442 (Sup. Ct. Albany Co.), *aff'd*, 23 A.D.2d 933, 259 N.Y.S.2d 644 (3d Dep't), *aff'd*, 16 N.Y.2d 47, 209 N.E.2d 701, 262 N.Y.S.2d 75 (1965).

⁸ Act of Apr. 16, 1964, ch. 531, § 9, 1964 N.Y. Laws 801, 803 (McKinney) (eff. Oct. 31, 1964) ("ABC Law") § 101-b(3) (McKinney) (amended 1967).

to invalidate the statute. As part of its regulatory scheme for the sale of liquor, New York may constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country.

384 U.S. at 43.⁹

Within a month of this Court's decision in *Seagram*, the Supreme Court of Kansas upheld the Kansas affirmation law enacted in 1961. That law required distillers to affirm that sales to "distributors" would be at prices no higher than the lowest prices *currently* charged "to distributors anywhere in the continental United States." *Laird & Company v. Cheney*, 195 Kan. 675, 677, 414 P.2d 18, 20 (1966). The Supreme Court of Kansas relied on the holding of this Court in *Seagram*. It saw no legal significance in the difference between the Kansas law, which required affirmation of parity with the lowest current prices, and the New York law, which required equality with the lowest prices charged in the previous month. The Kansas court's reliance was logical and correct, for in *Seagram* this Court had discussed the long-standing practices in the monopoly states of requiring lowest price affirmation pegged to current prices. 384 U.S. at 43-45. The Court had ruled that New York could "*insist*" that liquor prices to domestic wholesalers be as low as prices offered elsewhere in the country. 384 U.S. at 43 (emphasis added).¹⁰

⁹ The affirmation provisions concerning sales from wholesalers to retailers were repealed by Act of May 10, 1967, ch. 798, § 3, 1967 N.Y. Laws 1343, 1345 (McKinney) (eff. June 10, 1967).

¹⁰ The affirmation provision upheld in *Seagram* did not effectively "*insist*" that prices charged to New York wholesalers be as low as prices offered elsewhere, because the affirmation only required equality with previously charged prices. The Kansas law upheld in *Laird* required current lowest price affirmation and therefore effectively *insisted* on equality.

B. New York's Present Affirmation Law Was Enacted In Conformity With And Reliance Upon *Seagram* And In Response To Requests From Distillers.

Within a year of this Court's final disposition of *Seagram*, New York amended its price affirmation statute to its present form, requiring affirmation that the prices charged to wholesalers be no higher than the lowest prices charged to wholesalers or a monopoly state anywhere in the United States during the period when the distiller's price schedule was in effect.¹¹

New York's reliance upon the decision of this Court in *Seagram* in amending the statute is specifically noted in the legislative history.¹² However, the legislative history also reveals that a dominant motivation for amending the statute was to respond to the requests of distillers that the statute be made less onerous to them by alleviating an unintended effect that the law had on transactions in interstate commerce. This unforeseen effect was described

¹¹ Like many states, which comprehensively regulate the alcoholic beverage industry (see discussion at page 42, *post*), New York requires distillers to "post" the prices to be charged wholesalers for their products. New York ABC Law 101-b(3) & (4). Because this "posting" and the required lowest price affirmation must be filed on the "25th day of each month" to be effective on the first day of the second succeeding month (35 days later) Brown-Forman and the *amici* supporting its position refer to New York's statute and similar statutes in states such as New Mexico as "prospective" affirmation statutes. The distinction they draw between "current" and "prospective" affirmation is specious. Prospectivity is merely an incident of the posting process. The so-called "current" and "prospective" statutes all require that their states' wholesalers be charged no more than the lowest price currently being charged to wholesalers elsewhere. Failure to recognize this has produced confusion among Brown-Forman's supporters. For example, in the brief *amicus curiae* of the United States Brewers Association ("U.S.B.A."), South Carolina's statute is referred to as a "contemporaneous" affirmation requirement, Brief, at 8 n.5, whereas the Wine Institute's brief characterizes South Carolina's statute as "prospective." Brief, p. 6. To avoid further confusion, and because the distinction is specious, the appellee will refer to all the so-called "current," "contemporaneous," and "prospective" affirmation provisions as "concurrent." *E.g.*, Wine Institute Brief, at 8.

¹² Memorandum for Governor Nelson Rockefeller from Attorney General Louis J. Lefkowitz, April 21, 1967, Governor's Bill Jacket, ch. 798, 1967 N.Y. Laws.

recently by the district court in *Joseph E. Seagram & Sons, Inc. v. Gazzara*, 610 F. Supp. 673 (S.D.N.Y., 1985), *appeal docketed* No. 85-7547 (2d Cir. July 1, 1985) ("*Gazzara*"),¹³ where it upheld New York's affirmation statute against a nearly identical challenge asserting facial unconstitutionality under the commerce clause. The court stated:

A distiller could not raise prices in any state with an affirmation requirement based on *current* prices unless it *simultaneously* discontinued sales for a month in each state having an affirmation requirement based on the *preceding* month's prices. Nor could a distiller raise prices in any state with an affirmation based on the *preceding* month's prices unless it first discontinued sales for a month in all other states having that requirement. At the urging of numerous distillers, among others, the law was amended to require an affirmation based upon *current* prices.

610 F. Supp. at 675 n.3 (emphasis in original).

Numerous distillers urged the very change which they now assert makes the New York statute unconstitutional and *Seagram* distinguishable on its facts. Among them, were at least one party to this action and seven of the *amici curiae* supporting Brown-Forman's position.¹⁴

¹³ The United States Court of Appeals has stayed the hearing and determination of the appeal in *Gazzara* pending the outcome of the instant appeal.

¹⁴ In 1967, Jos. Garneau Co. S.A., a division of Brown-Forman, joined with the Kobrand Corporation, "21" Brands, Inc., The Paddington Corporation and Schieffelin & Co., who are members of the *amicus* Distilled Spirits Council of the United States, Inc. ("DISCUS") and others to urge enactment of the amendment, stating in part:

we respectfully request approval of Senate 4569 by Governor Rockefeller ... The proposed amendment to a "*current month basis*" would simplify administrative enforcement in checking prices in this state against actual sales in other states made two months previously which is the procedure now required.

(footnote continued)

These distillers urged that a current price affirmation law would be simpler, fairer, and more likely to achieve the purposes of lowest price affirmation; it would eliminate the distillers' incapacity to affirm simultaneously lowest prices in more than one "prior month" state or in a "prior month" state and a "current" price state. Both Brown-Forman and the Wine Institute admit the liberating effect this amendment had on interstate commercial transactions¹⁵ while clinging to the assertion that the amendment mandates overruling *Seagram*.

Letter of Lester H. Schreiber, Counsel, New York Importers and Distillers Association, Inc. to Robert Douglas, Counsel to the Governor, Apr. 12, 1967 (emphasis supplied).

Hiram Walker, Inc., another member of DISCUS, wrote to Governor Rockefeller:

In placing affirmations on a *current* basis, it assures a New York wholesaler the lowest price in the United States for the liquor he is buying at the time he buys it,—not two months earlier. It eliminates the confusion that necessarily results from having different affirmation dates in several states and the need to stop selling in one state or the other for one or two months in order to give the lowest price to wholesalers in both states. ...

Letter of Raymond Revit, Executive Vice-President, Hiram Walker, Inc. to Governor Nelson Rockefeller, Apr. 11, 1967 (emphasis supplied). Similar support was also registered by Heublein, Inc., a DISCUS member, and other distillers. The Governor's Bill Jacket, which contains all correspondence received by the Governor subsequent to passage and prior to approval, does not include a single dissent from a distiller, vintner or brewer. Governor's Bill Jacket, ch. 798, 1967 N.Y. Laws.

¹⁵ The brief *amicus curiae* of the Wine Institute, at 6, states: "The New York Legislature, recognizing the conflict from the interstate effects of these laws, changed its statute to a prospective one." Brief of Appellant Brown-Forman, at 30 n.14, states: "The interlocking effect of two or more historic or retrospective lowest-price statutes may directly burden interstate commerce."

However, among the thirty-nine states which require affirmation of lowest price today, only Arizona uses retrospective affirmation and the prior period is indefinite. Ariz. Rev. Stat. Ann. § 4-253(A) (Supp. 1984). Therefore, no such burden can now result from the interaction of the affirmation provisions.

Following the decision in *Seagram*, nineteen additional states adopted lowest price affirmation provisions.¹⁶ Thirty-nine states, including the eighteen monopoly states,¹⁷ currently require lowest price affirmation. Most states enacted these provisions in reliance upon this Court's decision in *Seagram*, as noted in the legislative history of several of these statutes, including the current New York affirmation law.¹⁸ State courts have also relied upon the *Seagram* decision when upholding affirmation laws against commerce clause challenges. *United States Brewers Ass'n, Inc. v. Director New Mexico Dep't of Alcoholic Beverage Control*, 100 N.M. 216, 668 P.2d 1093, *appeal dismissed*, 104 S. Ct. 1581 (1984); *Laird v. Cheney*, 196 Kan. 675, 414 P.2d 18 (1966).

¹⁶ The nineteen states which adopted lowest price affirmation subsequent to the decision in *Seagram* are: Arizona, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Louisiana, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Jersey, Oklahoma, Rhode Island, South Carolina, South Dakota and Tennessee.

¹⁷ The eighteen monopoly states are: Alabama, Idaho, Iowa, Maine, Michigan, Mississippi, Montana, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming.

¹⁸ E.g., Connecticut: 1973 Conn. Gen. Ass., 16 House Proceedings, Part 10, at 5145-46; Nebraska: Neb. Comm. on Misc. Subjects, Minutes of Hearing on Mar. 20, 1975, at 3; New York: Memorandum for the Governor from Attorney General, Apr. 21, 1967, Governor's Bill Jacket, ch. 798, 1967 N.Y. Laws.

II. THERE IS NO REASON HERE TO DISTURB THE SEAGRAM RULING THAT THE AFFIRMATION LAW WAS VALID ON ITS FACE. THE DISTILLER AGAIN MERELY ALLEGES, BUT CANNOT DEMONSTRATE, ANY IMPERMISSIBLE EXTRATERRITORIAL EFFECT.

In *Seagram*, the Court rejected the distiller's facial challenge to New York's affirmation law but indicated that a challenge to the law, as applied, might be appropriate for consideration in a case with a record actually demonstrating, rather than conclusorily alleging, an unconstitutional burden on interstate commerce:

It will be time enough to assess the alleged extraterritorial effects of [the New York law] when a case arises that clearly presents them. 'The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids.'

...

Although it is possible that specific future applications of Chapter 531 may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise. We deal here only with the statute on its face. And we hold that, so considered, the legislation is constitutionally valid.

384 U.S. at 43, 52 (citations omitted).

Brown-Forman and other distillers, have returned to challenge New York's affirmation statute. However, they have not returned with the case which might reasonably have been envisioned by this Court, one which would allow it "to assess the alleged extraterritorial effects of [New York's affirmation statute] when a case arises that clearly presents them." Instead, Brown-Forman presents the same case as *Seagram*, alleging *facial* unconstitutionality under the commerce clause for the same reasons as in

Seagram, citing the same precedents (principally the 1935 decision in *Baldwin v. G.A.F. Seelig*, 294 U.S. 511 (1935)) and again without a record. There is not a single word in the present record to substantiate any of Brown-Forman's claims of an unconstitutional burden on commerce.²⁸ Furthermore, the distillers' challenge comes against a backdrop of recent and substantial state reliance on the *Seagram* case to create a nearly nationwide proscription on discriminatory liquor pricing.

The sole factual issue raised below concerning actual application of the New York law, was the alleged burdensome interaction between New York's statutory ban on liquor discounts and another part of the affirmation provision. This Court, in noting probable jurisdiction, declined to consider that dispute, which was presented in Question I of Brown-Forman's Jurisdictional Statement. 106 S. Ct. 55 (1985); A. 110. Even with respect to that dispute, Brown-Forman proceeded without a record demonstrating the harm it predicted. Referring to the absence of factual support for Brown-Forman's assertions, the Court below stated "It would require us to engage in mere speculation were we to declare on such a tenuous basis, the lowest price affirmation statute unconstitutional as applied." J.S. App. 12a.²⁹

²⁸ Indeed, Brown-Forman petitioned this Court to relieve it from the requirement of preparing and printing the joint appendix, asserting that "appellant is convinced that it is unnecessary for the Court to examine the now irrelevant evidentiary record made below, there are no parts of the record below to which the Court's particular attention should be directed, and consideration of this appeal would not be facilitated by inclusion of any portion of the record in an appendix." Appellant's Motion for Leave to Dispense With Printing Joint Appendix, October 28, 1985, at 2. Although an appendix has been filed, there is scant reference to it in Brown-Forman's brief.

²⁹ New York ABC Law 101-b(3)(g), J.S. App. 53a-54a requires that all discounts, allowances, rebates, or inducements provided to wholesalers in other states must be reflected in the lowest price affirmation required by ABC Law § 101-b(3)(d). J.S. App. 53a.

Furthermore, ABC Law § 101-(b)(2) prohibits the granting of any "discount, rebate, free goods, allowance, or other inducement of any kind" to wholesalers
(footnote continued)

Moreover, the dispute which the Court declined to consider was Brown-Forman's real concern in this litigation. The issue now

or retailers of liquor. Brown-Forman had argued unsuccessfully below that the interaction between New York's statutory ban on discounting, and its requirement that such discounts in other states be quantified in determining the lowest price affirmation, prevented Brown-Forman from using a promotional program in other states, whereby it granted cash sums to wholesalers based upon prior year purchases of Brown-Forman products. Brown-Forman had argued, *hypothetically*, that if it quantified the value of the rebate granted in another affirmation state and affirmed a lowest price in New York net of the cash price minus rebate in the other state, that other state *would* in turn reject Brown-Forman's affirmation and require Brown-Forman to affirm at the lower New York (cash only) price. This process would continue in a downward spiral until the price of Brown-Forman's products became zero. The predicted sequence never occurred, nor did Brown-Forman ever seek permission of an affirmation state allowing the rebates to affirm a net price broken down as cash price per case of liquor minus the rebate quantified on a per case basis.

When Chivas Regal Scotch Whiskey contended that the above-cited New York provisions prevented it from using a "Quality Discount Plan" in other states, New York, utilizing the "good cause" exception provided in ABC Law 101-b(3)(a), permitted Chivas Regal to provide New York wholesalers with the cash equivalent of the discounts provided in other states. *Gazzara*, 610 F. Supp. at 677-78 n.5. In *Seagram*, this Court discussed this "good cause" provision at length in two different portions of the opinion and concluded that it provided New York with flexibility to prevent the statute from having burdensome extraterritorial effects and encroaching upon federal interests:

Moreover [enactment of § 101-b(3)(a)] has amended the ABC Law by granting to the State Liquor Authority ample discretion to modify the schedule requirements. We cannot presume that the Authority will not exercise that discretion to alleviate any friction that might result should the ABC Law chafe against the Robinson-Patman Act or any other federal statute.

• • •

As the Court of Appeals observed with regard to these provisions, "The statute is concerned with New York practices and, if the sales in other States have no relevancy to New York enforcement, the statute permits the Liquor Authority for good cause to waive the general prohibition against sales to wholesalers in the absence of such schedules. It would be reasonable to expect that the statute would be administered consistently with its sole purpose to regulate the intrastate sale of liquor." We accept this construction of the statute by New York's highest court.

384 U.S. at 46, 51 (citations omitted).

before this Court was not asserted by Brown-Forman in the administrative proceedings below nor in the petition which commenced the proceedings below in the courts of New York. A.3-10. The claim of facial invalidity was raised by Brown-Forman for the first time in the Appellate Division, New York's intermediate appeals court.

The present case therefore does not present the circumstances or record which this Court indicated would justify a new challenge to New York's affirmation law. This case is more in the nature of a reargument of *Seagram* twenty years later. Because Brown-Forman presents the same facial challenge as in *Seagram*, and again without a record, this brief will demonstrate that the decisions of this Court during the last twenty years do not require it to overrule *Seagram*, and the affirmation statute should again be held constitutionally valid on its face.

III. THE AFFIRMATION LAW MUST BE JUDGED UNDER THE BALANCING STANDARDS OF *PIKE v. BRUCE CHURCH, INC.* BECAUSE THE LAW'S OBJECT IS LEGITIMATE AND IT DOES NOT DIRECTLY BURDEN INTERSTATE COMMERCE.

In *Seagram*, this Court assessed New York's price affirmation law under a classic commerce clause balancing test, weighing the putative local benefits which are the object of state regulation against the burden, if any, which the regulation imposes upon interstate commerce. The Court found that *Seagram* had presented unsubstantiated speculation about extraterritorial effects. These were insufficient to displace the legitimate objectives which motivated New York to enact a law sensibly designed to achieve those objectives.

This Court has employed such a balancing test in commerce clause cases since the landmark decision in *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 298 (1852), while continuing to refine the test. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Experience and the accretion of precedent have resulted in a special application of the test to state regulations which directly

or intentionally burden interstate commerce. The Court has deemed these to be "virtually *per se*" violative of the commerce clause. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). In determining whether state action is *per se* violative of the commerce clause or instead is more appropriately analyzed under the flexible standards summarized in *Pike v. Bruce Church, Inc.*, the Court consistently examines three characteristics of the state's regulation. These are the state's objectives; whether the state regulates "evenhandedly"; and whether the resulting effect, burden on or regulation of interstate commerce is direct or merely "incidental." *Pike*, 397 U.S. at 142.

A. The Affirmation Law Has A Legitimate Objective.

The first of the three threshold criteria for determining whether state regulation is *per se* invalid is the legitimacy of the regulatory objective. However, "save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods," *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951), state regulation is deemed *per se* invalid when the means chosen to advance an otherwise legitimate objective directly burdens interstate commerce.

The legitimacy of the objective of New York's affirmation statute was settled in *Seagram*:

The announced purpose of the legislature was to eliminate "discrimination against and disadvantage of consumers" in the state.

384 U.S. at 47 (citations omitted).

This Court has consistently held that protecting a state's economy and its consumers are legitimate concerns and objects of state regulation, unless the state's method directly or excessively burdens interstate commerce. For example, in *City of Philadelphia v. New Jersey*, the Court invalidated a New Jersey statute which barred out-of-state waste materials from New Jersey landfill sites while permitting continued acceptance of New Jersey waste. In so doing, the Court admonished the parties that their dispute

over whether the ban on out-of-state waste was an environmental measure or one aimed at saving money for New Jersey residents was not relevant:

Thus it does not matter whether the ultimate aim of ch. 363 is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, *for we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment.*^{*} And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of *all*^{**} waste into the state's remaining landfills, even though interstate commerce may incidentally be affected.

437 U.S. at 626 ^{*}(emphasis supplied) ^{**}(emphasis in original). Similarly, in *Parker v. Brown*, 317 U.S. 341, 346 (1943), the Court upheld over commerce clause and Sherman Act challenges a California program intended "to conserve the agricultural wealth of the State."

B. The Affirmation Law Regulates Evenhandedly, Applying Identically To In-State and Out-of-State Businesses And Products.

The affirmation statute also clearly satisfies the criterion of evenhandedness. The law applies identically to in-state and out-of-state companies and products.²¹

In *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), the Court rejected a commerce clause challenge to a Minnesota regulation which banned the use of non-refillable plastic milk

²¹ *Dock & Lord, Inc. and Distillerie Stock U.S.A.* ("Stock") hold New York licenses to distill spirits and "rectify" alcoholic beverages, such as gin, in the state. The affirmation law applies to any such domestically produced liquors in an identical manner to spirits distilled in other states. Furthermore, several distillers are incorporated in New York. Among these are Dock & Lord, Stock, Renfield Importers, Ltd., Schieffelin & Co., and "21" Brands, Inc. The court has stated that "the existence of major in-state interests adversely affected by the Act is a powerful safeguard against legislative abuse." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 n.17; see also *South Carolina State Highway Dep't v. Barnwell Bros., Inc.*, 303 U.S. 177, 187 (1938).

containers. In assessing the regulation under the criterion of neutrality, the Court stated:

Minnesota's statute does not effect "simple protectionism," but "regulates evenhandedly" by prohibiting all milk retailers from selling their products in plastic, non-returnable milk containers without regard to whether the milk, the containers, or the sellers are from outside the State.

449 U.S. at 471-72 (citations omitted). By a parity of reasoning, New York's statute regulates evenhandedly by requiring all distillers to affirm that their prices to New York wholesalers are equal to the lowest prices charged elsewhere, without regard to whether the liquor or the distillers are from inside or outside the state.

C. The Affirmation Law Is Not Protectionist And Does Not Discriminate Against Interstate Commerce, Obstruct Its Flow, Or Directly Regulate It.

Even a valid state objective accomplished by an evenhanded regulation may be *per se* invalid if the measure more than incidentally affects or burdens interstate commerce, by directly regulating it, *Baldwin v. G.A.F. Seelig, Inc.* 294 U.S. 511, 521 (1935), directly burdening it, *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 (1982); *Public Utilities Comm'n v. Attleboro Steam & Electric Co.* 273 U.S. 83 (1927), patently discriminating against it, *Dean Milk Co. v. City of Madison*, 340 U.S. at 354, or effecting simple "economic protectionism," *Bacchus Imports, Ltd. v. Dias*, 104 S.Ct. 3049, 3055 (1984). The lowest price affirmation provision has none of these effects. It does not isolate New York from interstate commerce by erecting barriers to the products of other states, *Baldwin v. G.A.F. Seelig; Bacchus*. Likewise it does not isolate the State by preventing privately owned products within the State from entering the flow of interstate commerce, *H.P. Hood & Sons, Inc. v. Du Mond*,

336 U.S. 525, 532-33 (1949);²⁸ *New England Power Co. v. New Hampshire*. Therefore, the flow of commerce into and out of New York State is unimpeded.

The affirmation law does not directly regulate activities or transactions wholly outside the state. *Edgar v. MITE*, 457 U.S. 624, 641-43 (1982) (plurality opinion).²⁹ It does not diminish the complete discretion of the distiller to set its price at any level in any other state, but thereafter merely requires equality in treatment for New York.

²⁸ In *H.P. Hood*, this Court held a New York statute unconstitutional, as applied, when the statute prevented a Massachusetts dairy from shipping milk produced in New York into the Boston area. Although the analysis used by the Court was a balancing test similar to the current standards articulated in *Pike v. Bruce Church*, the Court has now cited *H.P. Hood* as a case falling within the *per se* category. See *City of Philadelphia v. New Jersey*, 437 U.S. at 624.

²⁹ In *Edgar v. MITE*, only four Justices joined in the part of the opinion which affixed the *per se* label to Illinois' direct regulation of transactions wholly outside that state. The opinion of the Court, instead, held the statute invalid under *Pike* analysis. In many, and indeed the majority of cases, when state regulations had one of the effects which the Court has placed in the *per se* category, the Court's analysis was, in fact, conducted under a balancing test analogous to those utilized in *Pike v. Bruce Church* and *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443-44 (1960). For example, in *Great Atlantic and Pacific Tea Co., Inc. v. Cottrell*, 424 U.S. 366 (1976), which involved a Mississippi barrier to "wholesome milk" from Louisiana, the Court employed the *Pike* test. In *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 352-53 (1977) the Court noted that North Carolina's ban on the display of state apple grades was apparently intended to shield North Carolina's crop from competition with Washington apples, but held the regulation invalid under the *Pike* test. Similarly in *Lewis v. B.T. Investment Managers, Inc.*, 447 U.S. 27, 42-43 (1980), this Court invalidated a Florida statute which barred out-of-state bank holding companies from owning or operating an investment advisory service within the state, but avoided a finding of *per se* invalidity. See discussion in preceding footnote. Mindful of its often stated principle that "in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even to some extent, regulate it." *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 (1945), the Court has clearly preferred the more flexible method of analysis.

Brown-Forman and the *amici curiae* admit that the affirmation law is evenhanded³⁰ and that its effect on commerce is incidental,³¹ but argue without any support in the record that the magnitude of the alleged effect is so great that it nevertheless constitutes a direct burden on interstate commerce. *Pike v. Bruce Church, Inc.* demonstrates that this contention is without merit:

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

397 U.S. at 142.

In *Pike*, the "incidental" burdens outweighed a "legitimate" but "tenuous" state interest. 397 U.S. at 145. In *Parker v. Brown*, 317 U.S. 341, 346 (1943), the Court upheld an agricultural prorate program which the Court found had "a substantial effect on the [interstate] commerce" in raisins by stabilizing and raising the prices of 95 % of the nation's and one-half of the world's supply. 317 U.S. at 359. Despite this "substantial" effect on interstate commerce, the Court proceeded to analyze the competing interests and upheld the program. 317 U.S. at 362-63.

In *Baldwin v. G.A.F. Seelig*, this Court invalidated a New York law which directly regulated out-of-state transactions by barring from the state Vermont milk which had been purchased by wholesalers at less than a price set by New York. Brown-Forman's reliance upon *Baldwin* to affix the *per se* label to New York's affirmation law is especially curious because that 1935 decision was cited by this Court by way of direct contrast with New York's

³⁰ Appellant's brief, at 19.

³¹ For example, the brief *amicus curiae* of the Wine Institute states: "To be sure, the distillers in this case have the theoretical freedom to lower their prices in other states to whatever level they want. ..." Brief, at 15 n.34. The distillers' freedom is anything but "theoretical." The affirmation law's pricing mechanism is totally dependent upon a distiller initially setting its price in other states.

affirmation law upheld in *Seagram*. 384 U.S. at 43. The affirmation statute leaves total discretion over the setting of out-of-state prices to the distiller, or for that matter to another state's liquor control authority. In fact, the New York affirmation statute requires precisely what New York's invalid milk regulation prevented, *i.e.*, that New York wholesalers be able to purchase a product as cheaply as a Vermont wholesaler, thereby invigorating rather than depressing interstate transactions.

Brown-Forman's avoidance of any analysis of the affirmation statute under the flexible standard of *Pike v. Bruce Church, Inc.*, and its attempt to have the Court apply *per se* analysis, is a virtual concession that it cannot prevail under the applicable balancing test. *Seagram* did not prevail under this standard in 1966 without a record. Brown-Forman, which initially challenged a different provision,²⁶ now presses the same arguments as *Seagram* did and again without a record.²⁷ As demonstrated in Section IV, the affirmation law is consistent with the commerce clause when analyzed under the *Pike* balancing test, even without considering the additional latitude which must be accorded a state under the commerce clause, when as here, it is regulating the importation and distribution of liquor. (Section V).

²⁶ See discussion at 13, *ante*.

²⁷ Acutely aware of the non-existence of a record in this case and the striking similarity to the posture of *Seagram*, *amicus curiae* The Distillers Somerset Group, Inc. candidly admits that:

Should the Court determine that the record herein is similarly insufficient to assess the effects of the present New York statute on interstate commerce — a conclusion that would appear unnecessary in light of *Healy* — we would urge the Court to again couch its opinion, as it did in *Seagram*, in a manner that would permit the lower courts to entertain challenges to price affirmation statutes upon a showing of the adverse effects upon interstate commerce that result from such statutes.

Brief of The Distillers Somerset, Group, Inc., at 17 n.*.

IV. THE BENEFITS OF THE AFFIRMATION LAW OUTWEIGH ITS ALLEGED INCIDENTAL EFFECTS, WHICH IN ANY EVENT WOULD NOT BE CONSIDERED BURDENS ON INTERSTATE COMMERCE.

In *Pike v. Bruce Church, Inc.*, this Court summarized "the criteria for determining the validity of state statutes affecting interstate commerce."

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, but more frequently it has spoken in terms of "direct" and "indirect" effects and burdens.

397 U.S. at 142. (citations omitted). The Court has amplified the last of the seven inquiries specified in *Pike*,²⁸ *i.e.*, whether the state's objective could be promoted as well with a less burdensome approach, in the subsequent decision of *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976), stating that the Court "must of course, consider the 'consequences to the state if its actions were disallowed.'" 424 U.S. at 373.

²⁸ Those seven are whether the regulation is "evenhanded," whether the objectives are legitimate, whether the objectives are in fact effectuated by the regulation, whether its effect on interstate commerce is incidental, the "nature" of the legitimate local interest served, the burden, if any, on interstate commerce, and whether the state's objective could be promoted as well with a less burdensome approach.

Of the seven questions the Court asks in its inquiry into burdens on commerce, the first three are threshold issues which have been addressed in Section III of this brief. The legitimacy of the State's goal in enacting the affirmation law has already been clearly recognized by this Court. *Seagram*, 384 U.S. at 47. The law applies evenhandedly to the businesses and products of New York and its sister states. The law's effect on interstate commerce is purely incidental, for each distiller is free to set its price in other states at any level and only thereafter is required as a condition of selling in New York to offer the product at an equal price.

A. The Alleged Incidental Effects Of The Affirmation Law Are Not Burdensome

The record in this case is devoid of any concrete demonstration that New York's lowest price affirmation law has even incidental effects on interstate commerce. No such effect should be judicially presumed, especially in view of the Court's statement in *Seagram*, which is still true today:

The serious discriminatory effects of [the affirmation law] alleged by appellants on their business outside New York are largely matters of conjecture. It is by no means clear, for instance, that [the law] must inevitably produce higher prices in other states, as claimed by appellants rather than the lower prices sought for New York.

384 U.S. at 43. In lieu of a record, Brown-Forman and the *amici* have resubmitted the conjectural allegations made in *Seagram*.²⁹

²⁹ In cases where the court has undertaken a balancing approach, it has consistently relied upon a record as a predicate for assessing the burdens of state regulations and, when questionable, their benefits. For example, in *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), the Court invalidated an Arizona law which limited the number of cars on interstate railroad trains travelling within that state. Although the law was intended to decrease accidents resulting from "slack action," the record showed that not only had the regulation failed in this regard but it had actually increased accidents due to grade crossing collisions with motor vehicles, pedestrians and other trains. 325 U.S. at 776-78.

(footnote continued)

They argue that a distiller's pricing decision in other states will be distorted by the knowledge that if it chooses to sell in New York, it will be required to do so on the same terms as elsewhere. Appellant's Brief, at 16. This type of incidental effect, however, is speculative. Even so, it does not constitute a "burden" on commerce within the meaning of this Court's decisions.³⁰

In *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), this Court upheld the validity of Maryland's retail gasoline "divorcement" law against a commerce clause challenge, rejecting arguments strikingly similar to Brown-Forman's. Maryland enacted a law which barred any refiner of gasoline from owning a retail gasoline station in that state. The refiners asserted that the law interfered with the natural functioning of the interstate market, and that this burden was exacerbated by the enactment of similar laws in other states.

First, the Court noted that because no gasoline was refined in Maryland, a claim of disparate treatment between in-state and out-of-state firms was meritless and the total amount of gasoline

In *Pike v. Bruce Church, Inc.*, the Court held that Arizona's "legitimate" but "tenuous" interest in having cantaloupes of a superior quality identified as having been cultivated in that State was outweighed by the proven burden of requiring the erection in Arizona of an unnecessary packing facility costing \$200,000. 397 U.S. at 145.

In *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), the Court upheld a state law banning the sale of milk in non-refillable plastic containers. The Court relied heavily upon a detailed record of legislative facts in concluding that "the burden imposed on interstate commerce by the statute is relatively minor." 449 U.S. at 472. The record was extremely important in that case, because the Court disagreed with the conclusions of the state court based upon that same record. 449 U.S. at 468-70. See also *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 809 n.18 (1976).

³⁰ A regulation may affect commerce, and substantially, without burdening it. For example, New York might ban the sale of locally distilled spirits, permitting their shipment to other states, while permitting the sale of spirits distilled in other states. Whatever other legal infirmities this plan might suffer from, it could not be said to burden interstate commerce, although it would affect commerce.

shipped into Maryland should be unaffected. 437 U.S. at 125. The affirmation law applies identically to liquor produced in-state and out-of-state.

Next, the Court observed that the statute did not "prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market." 437 U.S. at 126.¹¹ New York's statute neither prohibits the flow of spirits entering from outside the state nor makes any distinctions, whatsoever, between in-state and out-of-state firms at any level of the market.

In *Exxon*, the Court deemed it irrelevant that certain refiners might choose to withdraw entirely from the Maryland market. 437 U.S. at 127. Furthermore, the Court rejected the refiners' assertion that widespread adoption of similar laws produced a burdensome cumulative effect, having "serious implications for their national marketing operations," 437 U.S. at 128, a claim strikingly similar to Brown-Forman's arguments concerning the interaction among the thirty-nine states' lowest price affirmation provisions. It should also be noted that the law sustained in *Exxon* absolutely barred certain out-of-state firms from continuing their retail operations in Maryland. The New York law does not have such a preclusive effect.

In dismissing the major contention of the refiners, which was nearly identical to Brown-Forman's assertion of a competitive distortion in the interstate liquor market, the Court stated:

¹¹ Stating that the Maryland law did not "place added costs upon [interstate goods]," 437 U.S. at 126, the Court elucidated the nature of this impermissible burden, explaining that a state may not impose additional costs on goods because they are from out-of-state so as to place them at a competitive disadvantage with in-state goods or reduce the natural competitive advantage they might otherwise have over in-state goods. The Court cited and discussed *Hunt v. Washington State Apple Advertising Commission*, involving a North Carolina law which raised the cost of doing business for out-of-state apple merchants and eliminated the competitive advantage that Washington State apples would have otherwise had over North Carolina apples. This type of discrimination was also the primary effect of the statute held to be *per se* invalid in *Bacchus Imports v. Dias*, 104 S. Ct. 3049 (1984) (tax on out-of-state goods which exempted in-state goods). See Section V, *post*.

The crux of appellants' claim is that ... it [the state] has interfered' with the natural functioning of the interstate market either through prohibition or through burdensome regulation.' *Hughes v. Alexandria Scrap Corp.*, 341 U.S. 622. Appellants then claim that the statute 'will surely change the market structure by weakening the independent refiners ...' We cannot, however, accept appellants' underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market. See *Breard v. Alexandria*, 341 U.S. 622. As indicated by the Court in *Hughes* the Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.

437 U.S. at 127-28. (footnote omitted).

The commerce clause protects the flow of interstate commerce against regulation or burdens which have the effect of inhibiting that flow. Its concerns with competition are limited to preventing the states from erecting barriers which inhibit the products of other states from entering their state or its own products from leaving. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. at 809-10. Those concerns are not implicated by New York's statutory scheme.

Hughes involved a Maryland environmental law providing "bounties" to processors of auto hulks. The law required an out-of-state processor to submit extensive documentary proof of clear title to an auto hulk. In-state processors were exempt from most of these requirements. The indirect effect of the law was to decrease the flow of auto hulks out of the state. 426 U.S. at 803 n.13, 806 n.15, 809. The court upheld the law because Maryland's exercise of "the right to favor its own citizens over others" was accomplished without a "trade barrier of the type forbidden by the commerce clause," i.e., one which impedes the movement of goods into or out of the state. 426 U.S. at 810. The Court also observed that the alleged distortion of competition was in fact a "response to market forces, including that exerted by money

from the State." 426 U.S. at 810. The affirmation law like the laws upheld in *Hughes* and *Exxon*, aims to benefit the state's citizens and may incidentally become a factor, among others, which shapes market forces, but it does so without implicating any concern of the commerce clause.

Parker v. Brown, 317 U.S. 341 (1943), also addressed arguments similar to those raised by Brown-Forman. In that case, the Court reviewed an agricultural prorate program for the California raisin crop, which supplied 95% of this nation's raisins. The program was upheld over Sherman Act and commerce clause challenges despite the fact that the Court assumed that the program raised and stabilized the price of raisins and curtailed interstate shipments to some extent.³²

While recognizing that the program had a "substantial effect" on interstate commerce, the Court ruled that this effect was not an impermissible burden. The program's purpose was to "stabilize" raisin prices and bring a "fair return to the producers." Those "stabilized" and "fair" prices were not the prices competitive forces would have produced any more than the non-discriminatory and equal prices, which the affirmation law seeks for consumers, are the prices which they might have to pay in an otherwise unregulated market.³³

³²In sustaining a program which curtailed interstate shipments, *Parker* appears to have sanctioned conduct which was clearly burdensome within the meaning of the Court's other decisions. This may have been justified by a complementary federal policy which sanctioned such output restrictions. 317 U.S. 368. In any event, the appellee does not rely upon *Parker* for the principle that state regulations which obstruct the flow of interstate commerce are not burdensome.

³³The states' pervasive regulation of the importation and distribution of alcoholic beverages in this nation cause the alteration and suspension of market forces in numerous ways. Brown-Forman's assertion that free market forces would prevail without price affirmation laws is plainly incorrect.

The right to market prices unconstrained by state regulation, asserted by the distillers on behalf of allegedly injured consumers and wholesalers in New York³⁴ and other states, simply does not exist by force of the commerce clause. It was not accorded to the raisin consumers in *Parker v. Brown* nor the consumers discussed in *Exxon v. Governor of Maryland*, about whom this Court stated:

It may be true that the consuming public will be injured by the loss of high-volume, low-priced stations operated by the independent refiners, but again that argument relates to the wisdom of the statute, not to its burden on commerce.

437 U.S. at 128.

Directly on point is *United States Brewers Ass'n, Inc. v. Healy*, 532 F. Supp. 1312, 1324 (D. Conn.), *rev'd on other grounds*, 692 F.2d 275, 282 (2d Cir. 1982), *aff'd mem.*, 464 U.S. 909 (1983), where the district court rejected a claim that Connecticut's beer price affirmation statute deprived wholesalers and retailers in other states of the free market prices they would otherwise have:

The brewers' argument ... that the statute strips out-of-state retailers of a competitive advantage—lower prices—misses the point. Out-of-state wholesalers and retailers are not entitled to receive prices lower than those charged to their Connecticut counterparts. The out-of-state wholesalers and retailers have not, and could not complain that the statute takes from them the advantage of lower prices, when they have no right to those prices in the first place. If Connecticut may constitutionally regulate the prices brewers charge to their wholesalers, then it would seem to follow that the brewers may not complain about the *incidental* effects on their out-of-state customers when those effects

³⁴*Amicus curiae* Distilled Spirits Counsel of the United States, Inc. argues that the New York affirmation law deprives New York consumers and wholesalers of the lower prices they might receive. Brief, at 6, n.*. This argument highlights the wholly speculative nature of the distillers' claims in this case.

do not implicate constitutional rights. (emphasis added).³⁵

Brown-Forman, in effect, is asking the Court to recognize a new type of burden on interstate commerce. The Court's statement in *Hughes v. Alexandria Scrap Corp.* is equally valid here: "The novelty of this case is not its presentation of a new form of 'burden' upon commerce, but that [appellant] should characterize [New York's] action as a burden which the commerce clause was intended to make suspect." 426 U.S. at 807.

B. Brown-Forman Relies Exclusively On Cases Invalidating Laws Which, Unlike New York's, Directly Regulated Interstate Commerce, Were Protectionist, Or Required Businesses To Perform Unnecessary Operations In-State.

Brown-Forman does not cite any case in which this Court has held that effects of the type presumed to result from the affirmation law are considered burdensome to interstate commerce. Instead, Brown-Forman relies on cases in which the Court struck down statutes which directly regulated interstate commerce, failed to regulate evenhandedly, were protectionist or required "business operations to be performed in the home state that could more efficiently be performed elsewhere." *Pike v. Bruce Church, Inc.*, 397 U.S. at 147. In several cases, the invalid laws also failed to effectuate their regulatory objectives. New York's affirmation law does not suffer from any of these infirmities.

In *Edgar v. MITE*, the Court invalidated Illinois' corporate "takeover" statute. The statute in *MITE* directly regulated certain interstate transactions, acquisitions and communications with out-of-state shareholders. The law even regulated out-of-state transactions and acquisitions in which none of the shareholders were Illinois residents. 457 U.S. at 642. The New York affirmation

³⁵ The Court of Appeals did not reach this issue, reversing on other grounds, 692 F.2d at 282. The Court of Appeals decision is more fully discussed at 33, *post*.

provision would be analagous if New York set a price and then told a distiller that it must charge that price in another state, as with the statute invalidated in *Baldwin v. G.A.F. Seelig*. That is not the case. The Court's determination in *MITE* that Illinois had no legitimate interest in protecting out-of-state shareholders has no relevance here.

The Illinois law also failed to regulate evenhandedly, by exempting in-state firms from the statutory requirements when they offered to acquire their own shares. In so doing, the Illinois law also failed to further its own objectives of protecting shareholders faced with a tender offer. 457 U.S. at 644. The price affirmation law applies evenhandedly and precisely effectuates its statutory objectives.

MITE is typical of the cases relied upon by Brown-Forman. Their common thread was a state regulation which directly regulated interstate commerce. That was the effect of the law invalidated in *Buck v. Kuykendall*, 267 U.S. 307 (1925), which purported to empower the State of Washington flatly to deny a common carrier permission to operate an exclusively interstate auto stage line between Seattle and Portland, Oregon because it found that this route was already "adequately served." Although the Court noted that the State's decision limited competition, the holding was based upon the state's direct regulation of wholly interstate activity.

Thus, the provision of the Washington statute is a regulation of, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden it but to obstruct it.

267 U.S. at 316. New York's law, by contrast, has not obstructed the flow of commerce into or out of the state.

In *Shafer v. Farmers Grain Co.*, 268 U.S. 189 (1925), North Dakota achieved control of the interstate commerce in wheat, and with it the power to regulate it, through a facially neutral but intentionally burdensome law. For example, the statute required only those buying wheat by grade to obtain a state license,

but all wheat destined for interstate commerce was purchased by grade. Grading of wheat by a state-licensed inspector was waived if the grain was graded by a federal inspector, but there were none in North Dakota. North Dakota's previous regulatory scheme had been invalidated by the Court three years before in *Lemke v. Farmers Grain Co.*, 268 U.S. 50 (1922). The State then enacted a new statute "having the same general purpose," 268 U.S. at 191, and the same burdensome result. The Court did not countenance the attempted subterfuge because the continued obstruction of interstate commerce was plain.

Shafer and similar cases illustrate that under commerce clause analysis this Court scrutinizes the practical effect and not the formalities of the challenged regulation. New York was mindful of that when it explicitly relied upon this Court's decision in *Seagram*, in enacting the present price affirmation statute, and it should not be punished for that reliance.

Brown-Forman also relies upon *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945). See discussion at 22 n. 29 *ante*. In *Southern Pacific*, the Court invalidated Arizona's railroad train length regulation which not only failed in its objective of decreasing accidents due to "slack action," but actually increased casualties and property damage. 325 U.S. at 776-78. Thus, there was no salutary effect to balance against the law's impairment of the "free flow" and "efficiency" of interstate commerce. 325 U.S. at 779-80.

In *Pike v. Bruce Church, Inc.*, the Arizona statute did effectuate a "legitimate" but "tenuous" state interest of having cantaloupes of a superior quality identified as having been cultivated in Arizona. This minimal interest was insufficient to sustain a law which required a business to construct an unneeded fruit packing facility at a cost of \$200,000 and perform business operations in Arizona that could have been performed more efficiently out-of-state. 397 U.S. at 145.

Finally, Brown-Forman analogizes the presumed extraterritorial effects of New York's affirmation statute to the burdensome effects ascribed to the statute invalidated in *Hunt v.*

Washington State Apple Advertising Comm'n. The North Carolina law in that case required that crated apples sold or shipped into that State bear a U.S. grade or no grade at all. State grades were banned. The record showed that the State of Washington had a widely recognized apple grading system. Its grades were superior or equal to all comparable U.S. grades. North Carolina's statute was both enacted for and administered with the purpose of shielding North Carolina's apple crop from Washington's competition. 432 U.S. at 351.³⁰

New York's affirmation law has no such protectionist aim. It would not place locally distilled spirits at any competitive advantage nor diminish the natural competitive advantage of spirits distilled in other states.

C. The Affirmation Law Effectuates Its Goal With Precision And Less Effect On Commerce Than Any Alternative Measure

This Court must also consider whether New York's legitimate interest can be promoted as well with a lesser impact on interstate activities. *E.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 473. The affirmation law is precisely and narrowly fitted to meet its statutory objective and this Court's ruling that "New York may constitutionally *insist* that liquor prices to domestic wholesalers ... be as low as prices offered elsewhere in the country." 384 U.S. at 43 (emphasis added). Brown-Forman has not shown how the same objective can be achieved with a lesser effect on commerce. Furthermore, the current statute has less effect on interstate commerce than the statute upheld in *Seagram*, which was specifically amended by New York in the manner requested by the distillers.

As part of the inquiry into alternatives with less effect on interstate commerce, the Court must assess the practical consequences if the state's action were disallowed. *Great Atlantic &*

³⁰ Although the court stated that "we need not ascribe an economic protection motive to the North Carolina Legislature to resolve this case," 432 U.S. at 352, the Court has since cited *Hunt* as a case finding "economic protectionism" on the basis of "discriminatory purpose." *Bacchus*, 104 S.Ct. at 3055.

Pacific Tea Co. v. Cottrell, 424 U.S. at 373. In *Seagram*, the Court stated: "It is by no means clear, for instance that [the affirmation law] must inevitably produce higher prices in other states, as claimed by appellants, rather than the lower prices sought for New York." 384 U.S. at 43. The Court also noted that prior to passage of the affirmation law New York liquor consumers had suffered from a price disparity estimated at \$150,000,000 per year. 384 U.S. at 39 n.9.

Although the record today, as in 1966, is devoid of any demonstration that the affirmation law has caused higher prices in other states, it is evident that the law has produced the equality in pricing which was its goal. Brown-Forman admits this. From the record of past price discrimination, it can be reliably predicted that if the law were invalidated New York consumers would again have to pay more for liquor than consumers in other states. There is no record, however, from which to infer that consumers in other states would pay less than they are now paying for liquor.

Given the longevity and ubiquity of lowest price affirmation policies, which currently prevail in thirty-nine states and date back nearly a half-century, one additional consequence of invalidation can be projected. New York and other states will be likely to use their considerable powers under the twenty-first amendment to enact different provisions with the same general purpose. A state might simply require all distillers who sell in that state to disclose the prices they charge in other states. Using this information, the state would then set the maximum allowable price. This result would be fully consistent with precedents of this Court permitting state-fixed maximum prices in contexts where the state has less latitude under the commerce clause than it does when controlling the importation and distribution of alcoholic beverages. See *Nebbia v. People of State of New York*, 291 U.S. 502 (1934) (milk); *Townsend v. Yeomans*, 301 U.S. 441 (1937), (tobacco warehousing); *O'Gorman & Young v. Hartford Fire Ins. Co.*, 282 U.S. 251 (1931) (insurance); *Gold v. DiCarlo*, 380 U.S. 520 (1965) (theatre ticket resale).

D. The Statute Invalidated By The Second Circuit In *United States Brewers Ass'n v. Healy* Differs From The New York Affirmation Laws Upheld In The Prior and Subsequent Decisions of *Seagram* and *Gazzara*.

The reasoning in the Second Circuit's decision in *United States Brewers Ass'n, Inc. v. Healy*, 692 F.2d 275 (2d Cir. 1982), *aff'd mem.*, 464 U.S. 909 (1983), is inconsistent with the decisions of the Court, although the result reached in that case is valid.³⁷ In *Healy*, the Second Circuit reversed the District Court's decision upholding a Connecticut lowest price affirmation statute applicable to beer. The Connecticut statute differed from New York's affirmation statute in two significant respects.

First, the Connecticut statute required brewers to set and post beer prices for wholesalers at no higher than the lowest price in the four states contiguous to Connecticut (New York, New Jersey, Massachusetts and Rhode Island). The trial court had found that the purpose of the statute was to divert beer sales from the neighboring states into Connecticut and thereby generate increased tax revenues on beer sales in Connecticut. The targeting of the neighboring states for those purposes could have justified a ruling that the statute was discriminatory in purpose, which would suffice to invalidate a law under the commerce clause. *Bacchus*, 104 S. Ct. at 3055; *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. at 352-53. The Connecticut statute may have represented one of "the rare instance[s] where a state artlessly disclosed an avowed purpose to discriminate against interstate goods." *Dean Milk Co. v. Madison*, 340 U.S. at 354. New York's affirmation law has no such purpose.

A second important distinction between the Connecticut and New York statutes is the "good cause" provision provided in New

³⁷ A summary affirmance "may not be read as an adoption of the reasoning of the judgment under review." *Hooper v. Bernalillo County Assessor*, 105 S.Ct. 2862, 2868 n. 11 (1985). Furthermore, a summary affirmance does not have the same precedential value as an opinion of this Court treating the question on the merits. *Edelman v. Jordan*, 415 U.S. 651, 671 (1974); *Richardson v. Ramirez*, 418 U.S. 24, 83 n.27 (1974) (Marshall, J. dissenting).

York ABC Law § 101-b(3)(a). This provision allows the State to waive, for good cause shown, the affirmation and posting requirements of the law. For example, a distiller might request permission to raise or lower its posted and affirmed price in the middle of a month. This Court considered the "good cause" provision so significant that it was cited twice in the Court's decision of *Seagram*, 384 U.S. at 46 and 51, and characterized by the Court as a provision which should "alleviate any friction that might result should the ABC Law chafe against the Robinson-Patman Act or any other federal statute." 384 U.S. at 46. The Connecticut law has no such provision.³⁸

Instead of focusing on the clearly discriminatory purpose of the Connecticut statute, the Second Circuit in *Healy* distinguished *Seagram* in an illogical and demonstrably erroneous fashion. It found a crucial difference between a retrospective affirmation statute, like the one upheld in *Seagram*, and Connecticut's concurrent affirmation statute. It overlooked the fact that a concurrent affirmation statute actually alleviates the interactive effect of two or more retrospective statutes. See discussion at 7, *ante*. The Second Circuit disregarded the meaning of this Court's statement in *Seagram* that:

New York may constitutionally *insist* that liquor prices to domestic wholesalers ... be as low as prices offered elsewhere in the country.

384 U.S. at 43 (emphasis added). New York's concurrent affirmation statute does precisely that.

In *Gazzara*, 610 F. Supp. 673, the district court recently upheld the statute now before this Court. The district court recognized that the reasoning in the Second Circuit's opinion in *Healy* could not be reconciled with the reasoning of *Seagram* and therefore, distinguished *Healy* in a manner which assigned that case to its facts.

³⁸ Brown-Forman has not availed itself of this provision, to make a mid-month price change, in the twenty years since the decision in *Seagram*.

In *Gazzara*, the district court noted the lack of any record demonstrating that the affirmation law now before this Court was more burdensome than the statute upheld in *Seagram*:

Significantly, despite the fact that the amended New York affirmation statute has been in effect for eighteen years, plaintiff has not suggested how that statute has, *in practice*, proved more burdensome than the statute as originally enacted ... Plaintiff's offer of proof, in other words, is relevant to the question whether liquor price affirmation statutes in general are permissible (a question answered in the affirmative by the Supreme Court in *Seagram v. Hostetter*), but it does not support an argument that the New York statute as amended imposes a greater burden on interstate commerce than did the statute upheld by the Supreme Court in *Seagram*.

610 F. Supp. at 678. Next, the Court noted that the amended statute lessened the burdensome effect of a retrospective affirmation statute and that the amendment had been responsive to the requests of "numerous" distillers. 610 F. Supp. at 675 n.3, 678 n.6. The Court also reasoned that the affirmation law was not protectionist within the meaning of this Court's decisions in *Bacchus* and *Baldwin v. G.A.F. Seelig*, or any other case in which the Court has held state regulations *per se* invalid under the commerce clause:

It does not seek to promote local trade by forbidding or discouraging the importation of articles of commerce from another state... [A] comparison of the statute at issue in *Seelig* with the New York statute merely confirms that the latter is not protectionist in the traditional sense of the term.

610 F. Supp. at 679 (citations omitted). The court also discussed the salutary effects of the "good cause" exception, noting this provision could be used to permit mid-month changes in distillers' prices. 610 F. Supp. at 677.

Finally, the district court in *Gazzara* found that the affirmation law served a valid twenty-first amendment purpose, even under what it characterized as this Court's "heightened concern [in *Bacchus*]" that the purposes of a state's regulatory enactments bear some relation to the purposes of the Twenty-first Amendment." 610 F. Supp. at 680. The district court found that the affirmation law and this Court's 1966 decision had withstood the test of time.

V. THE WIDE LATITUDE GRANTED TO STATES WHEN EXERCISING THEIR POWERS UNDER THE TWENTY-FIRST AMENDMENT PROVIDES AN ADDITIONAL REASON FOR UPHOLDING THE AFFIRMATION LAW.

The Court has consistently recognized that a state may legitimately enact laws designed "to protect its residents' pocket-books," *City of Philadelphia v. New Jersey*, 437 U.S. at 626, or secure equal treatment in prices for them. *Seagram*, 384 U.S. at 43. New York's affirmation law is valid under traditional commerce clause analysis, irrespective of any special interest or competence the state may have when regulating within the area of alcoholic beverage control. Nevertheless, the powers granted to the states under the twenty-first amendment, to regulate the importation and distribution of liquor, provide additional reasons for sustaining New York's affirmation law.

When it upheld New York's lowest price affirmation law in 1966, this Court reiterated that " 'a State is totally unconfined by traditional commerce clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.' " 384 U.S. at 42 (quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964)). The Court found that the affirmation law placed restrictions on "liquor destined for use, distribution, or consumption in the State of New York ... [therefore] the Twenty-First Amendment demands wide latitude for regulation by the State." 384 U.S. at 42.

A. *Seagram* Is Fully Consistent With *Bacchus Imports, Ltd. v. Dias*.

Brown-Forman and the *amici* argue that *Bacchus* makes the twenty-first amendment irrelevant to the commerce clause analysis of laws which do not promote temperance. This is a grossly incorrect reading of *Bacchus*, which is fully consistent with *Seagram*.

In *Bacchus*, the Court invalidated Hawaii's intentionally discriminatory tax on intoxicating liquors, which exempted two locally produced beverages. The court ruled that the law constituted "economic protectionism" in both purpose and effect and

therefore need not be scrutinized under the balancing approach of *Pike v. Bruce Church, Inc.*, 104 S. Ct. at 3055-57. Having found that the tax belonged to the category of laws which are treated as *per se* unlawful, the Court also found that the tax was not "designed to promote temperance or to carry out any other purpose of the Twenty-First Amendment...". 104 S. Ct. at 3058-59 (emphasis added).

Bacchus is completely consistent with *Seagram* and in particular two of the basic principles of that earlier decision. First, in *Bacchus* the Court found that a state liquor law which otherwise constituted a *per se* violation of the commerce clause was not saved by the twenty-first amendment. That possibility was explicitly recognized in *Seagram*:

We need not now decide whether the mode of liquor regulation chosen by a state in such circumstances could ever constitute so grave an interference with a company's operations elsewhere as to make the regulation invalid under the Commerce Clause. See *Baldwin v. G.A.F. Seelig*, 294 U.S. 511.

384 U.S. at 42-43. The Court hastened to add that New York's lowest price affirmation law did not present such a case. *Id.* at 43. In *Bacchus*, the Court merely did what it said it might do in *Seagram*.

B. *Bacchus* Reaffirmed That Control Of The Importation And Distribution Of Alcoholic Beverages Is Within The Twenty-First Amendment's Central Grant Of Power To The States.

In *Bacchus*, the Court also reaffirmed that although the twenty-first amendment did not repeal the commerce clause with regard to the regulation of alcoholic beverages, it did grant the states additional latitude when regulating in furtherance of temperance and "other purpose[s] of the Twenty-first Amendment." 104 S. Ct. at 3058-59. In *Seagram*, where the Court noted that New York's affirmation law was *not* designed to promote temperance, it stated that "nothing in the twenty-first amendment or any other part of the Constitution requires that state

laws regulating the liquor business be motivated exclusively by a desire to promote temperance." 384 U.S. at 46-47. Furthermore, the Court found that the law was enacted within the central grant of power to the states under the twenty-first amendment. 384 U.S. at 42. To contend that this interpretation of the amendment has been set aside by *Bacchus*, it must be asserted that the Court there not only overruled *Seagram* but rejected the reasoning applied in a series of subsequent related decisions, including *Capital Cities Cable, Inc. v. Crisp*, 104 S. Ct. 2694 (1984), decided just two weeks before *Bacchus*. These cases all state that control of the importation of liquor and of the structure of the liquor distribution system is within the central power reserved by the twenty-first amendment to the states.

In *Heublein, Inc. v. South Carolina Tax Commission*, 409 U.S. 275 (1972), the Court upheld a South Carolina liquor regulation which compelled a distiller to maintain a business presence in that state which extended beyond the mere solicitation of sales, and beyond the business presence it would have chosen to maintain. The distiller was thereby subjected to state taxes. The Court ruled that the South Carolina law was not preempted by 15 U.S.C. 381(a), which prohibited states from imposing taxes on businesses engaged in interstate commerce which merely solicited orders within a state. Noting that the state was not confined by traditional commerce clause limitations, the Court stressed that requiring businesses to maintain certain minimum contacts was "an appropriate element in the State's system of regulating the sale of liquor." 409 U.S. at 283.³⁹ The Court also illustrated how

³⁹ In cases not involving the States' control of liquor importation or distribution, this Court has consistently invalidated state regulations which require a business to perform certain functions in-state which could be more efficiently performed out-of-state. *E.g.*, *Toomer v. Witsell*, 334 U.S. 385, 403-4 (1948); *Foster Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928); *Johnson v. Haydel*, 278 U.S. 6 (1928).

In *Toomer*, the Court stated that such regulations "impose an artificial rigidity on the economic pattern of the industry." 334 U.S. at 404. The subsequent decision in *Heublein* demonstrates not only the wider latitude afforded states when they regulate within their twenty-first amendment powers but the Court's awareness of the "artificial rigidity" which obtains in the liquor industry due to pervasive regulation.

requiring Heublein to maintain a presence in the State made it "easier for the State to enforce its requirement that the wholesale price in South Carolina be no higher than that elsewhere in the country." 409 U.S. at 283 (emphasis added). South Carolina's lowest price affirmation statute is the same type of concurrent affirmation statute which is at issue in the instant case, one which Brown-Forman describes as "prospective." Brief, at 5 n.4, 29.

In *Craig v. Boren*, 429 U.S. 190, 204-7 (1976), the Court rejected a claim that the twenty-first amendment permitted the states to enact classifications otherwise invidious under the equal protection clause of the fourteenth amendment, but stressed the states' broad powers to control the importation of intoxicants substantially free of traditional commerce clause constraints.

In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), this Court invalidated a California statute which required wine producers and wholesalers to adhere to resale price maintenance arrangements, which are *per se* unlawful under the Sherman Act. *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373, 404 (1911). The California statute was not immune from Sherman Act challenge under the "state action" sovereign immunity doctrine of *Parker v. Brown*, because the state neither set nor reviewed the fixed prices. Therefore, the statute failed the second prong of the *Parker* test, *i.e.*, the requirement of active state supervision. 445 U.S. at 105.

In discussing the conflict between the Sherman Act, which derives from the commerce clause, and the state's authority under the twenty-first amendment, the Court cited and discussed *Seagram* approvingly:

These decisions⁴⁰ demonstrate that there is no bright line between federal and state powers over liquor. The Twenty-first Amendment grants the States *virtually complete control* over whether to permit importation

⁴⁰ "These decisions" refer to a group of cases which the Court had discussed, culminating in its discussion of *Seagram*.

or sale of liquor and how to structure the liquor distribution system.

445 U.S. at 110 (emphasis added). In other words, in the 1980 *Midcal* decision the powers exercised in *Seagram* were deemed to be of the type in which the state had "virtually complete control."

The 1984 decision in *Capital Cities Cable, Inc. v. Crisp* involved an Oklahoma ban on wine commercials contained in the out-of-state cable television signals retransmitted to Oklahoma cable subscribers. The Court ruled that this ban was pre-empted by the pervasive federal regulation of cable television. Once again discussing competing state and federal interests in the realm of alcoholic beverage control, the court stated:

Oklahoma's advertising ban to the importation of distant signals by television operators engages only indirectly the central power reserved by § 2 of the Twenty-First Amendment - that of exercising 'control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.'

104 S. Ct. at 2709 (quoting *Midcal*, 445 U.S. at 10).⁴¹

The foregoing cases present a consistent line of decision which treats the structuring of the liquor distribution system and control over importation as the essence of the twenty-first amendment's grant of power to the states. In both *Heublein* and *Midcal*, the Court stressed that the comprehensiveness of a state's exercise of control is important in determining the degree of latitude the state will be granted. *Heublein*, 409 U.S. at 282-284; *Midcal*, 445 U.S. at 105-106 n.9. Individual state regulatory measures are not to be examined in isolation to determine whether they promote temperance, health or safety. Instead, they must be considered as part of an overall regulatory scheme, such as New

⁴¹ As previously discussed, the language quoted from *Midcal* is in turn the *Midcal* decision's characterization of *Seagram* and related cases.

York's, which regulates comprehensively to achieve many goals, including temperance.⁴²

⁴² New York comprehensively regulates the distribution of liquor in the state for the following stated purposes:

It is the declared policy of the state that it is necessary to regulate and control the manufacture, sale, and distribution within the state of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law.

ABC Law § 101-b(1).

This regulation is achieved through a detailed and interconnected statutory scheme. For example, each liquor manufacturer must file with the SLA, on or before the twenty-fifth day of each month, a schedule of prices to be charged New York customers during the second month succeeding the filing. ABC Law §§ 101-b(3)(a), (4). The schedule must identify each item to be sold by exact brand or trade name, the number of bottles per case, the bottle and case price and the age and proof if so stated on the label. ABC Law §101-b(3)(a). Schedules are made available for public inspection. ABC Law §101-b(4). A schedule price must be the uniform price charged by the manufacturer to all his New York customers, except for maximum volume or early payment discounts which are limited to those specified in the statute. ABC Law §101-b(2)(a). Each manufacturer must also file a monthly affirmation, affirming that the prices contained in the accompanying schedule shall, during the month the schedule is effective, be no higher than the prices charged by the manufacturer for such items elsewhere. ABC Law §101-b(3)(d). Wholesalers are bound by similar scheduling and pricing restrictions as to their customers, with three exceptions. ABC Law §101-b(3)(b). *E.g.*, for a limited time after filing, a wholesaler may lower — but not raise — one or more scheduled prices to meet any lower prices by competitors. ABC Law §101-bb(4).

The SLA actively supervises liquor pricing and may investigate and prosecute statutory or regulatory violations by licensees. ABC Law §101-b(6). More generally, the eleven articles and 163 sections of New York's ABC Law provide a statutory framework for the comprehensive regulation of the importation and distribution of alcoholic beverages in the state. ABC Law § 1 *et seq.*

Bacchus does not depart from these cases, and in fact gives concrete expression to principles foreshadowed in the earlier decisions. The holding in *Bacchus*, that Hawaii's *per se* violation of the commerce clause was not saved by the twenty-first amendment, was anticipated not only in *Seagram*, but in cases decided soon after the enactment of the twenty-first amendment, such as *Jameson & Co. v. Morgenthau*, 307 U.S. 171, 173 (1939), and *United States v. Frankfort Distilleries*, 324 U.S. 293, 299 (1945). The rule which emerges from *Bacchus* is consistent with a long line of precedent: the twenty-first amendment grants states latitude to regulate in ways that might otherwise encroach upon the commerce clause; that latitude is widest when the state is regulating effectively within the central grant of twenty-first amendment power; but there are constitutional limits to this state authority, and whether a particular state regulation sufficiently implicates the core powers of the twenty-first amendment so as to overcome a competing federal interest can only be determined in a "concrete case." *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. at 332. New York's lowest price affirmation statute is part of a comprehensive system to control the importation and distribution of liquor which was enacted within the central grant of twenty-first amendment power, as previously determined by this Court. 384 U.S. at 42. This is an additional reason to uphold New York's affirmation law.

VI. INVALIDATION OF THE AFFIRMATION LAW ON THE BASIS OF BROWN-FORMAN'S CLAIMS WOULD REQUIRE THE COURT TO ADOPT NOVEL, ILLOGICAL AND DIVERGENT STANDARDS FOR DEALING WITH ALLEGEDLY ANTICOMPETITIVE STATE ACTION UNDER THE ANTITRUST LAWS AND THE COMMERCE CLAUSE.

New York's lowest price affirmation law does not burden interstate commerce. It should be upheld whether the commerce clause balancing test is applied, with or without the additional latitude granted to states under the twenty-first amendment. There is an additional reason, however, why the Court should not invalidate the statute on the basis of Brown-Forman's claims of competitive injury.

Brown-Forman's contention is not that the affirmation law restricts the flow of interstate commerce or discriminates against commerce or even isolates New York from commerce. Brown-Forman complains that the law isolates New York from the forces of a competitive market and deprives distillers, wholesalers and consumers in other states of prices set by free market forces. The type of injury to competition claimed by Brown-Forman, if cognizable at all, is a concern of the antitrust laws. As demonstrated below, however, even if the affirmation law had an anticompetitive effect it would be immune from antitrust sanction.

The antitrust laws were enacted under the commerce clause power. "Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied, it 'exercised all the power it possessed.'" *United States v. Frankfort Distilleries*, 324 U.S. at 298 (quoting *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495 (1940)); see also *Atlantic Cleaners and Dyers v. United States*, 286 U.S. 427, 435 (1932). The antitrust laws have been described by this Court as the "Magna Carta of free enterprise" and "as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental freedoms." *United States v. Topco Associates, Inc.*,

405 U.S. 596, 610 (1970). Clearly, the Congress not only intended the antitrust laws to be the remedy for competitive injury but invested those laws with all the authority permitted to the federal government in that regard under the Constitution.

It would be illogical to employ the commerce clause to redress competitive injury of the type Brown-Forman alleges when for numerous reasons Brown-Forman could not prevail under competition's "Bill of Rights." It has not stated, and could not state, a claim for relief under the Sherman Act. 15 U.S.C. §§ 1-7. The affirmation law neither involves nor compels concerted activity in restraint of trade. *Seagram*, 384 U.S. at 45-46.

Even were one to assume, however, that the affirmation law either involved or compelled concerted activity to arrive at the posted and affirmed prices, *Parker v. Brown*, *California Retail Liquor Dealers Association v. Midcal Aluminum*, and the recent decisions in *Hoover v. Ronwin*, 104 S. Ct. 1989, (1984), and *Southern Motor Carriers Rate Conference, Inc. v. United States*, 105 S. Ct. 1721 (1985), demonstrate that New York has taken the clear path a state may take to immunize an anticompetitive arrangement from invalidation under the Sherman Act. State action sovereign immunity attaches when a State "clearly articulates" and "affirmatively expresses" its policy to supplant competition and actively supervises the policy itself. *Midcal*, 445 U.S. at 105. In *Midcal*, California's wine pricing system was held invalid because the statutory scheme for resale price maintenance arrangements was not actively supervised by the state. 445 U.S. at 105. In *Midcal*, the Court confirmed that "comprehensive regulation" of the liquor distribution system would have satisfied the requirement of active supervision. 445 U.S. at 106 n.9. Five years later, the *Southern Motor Carriers* decision demonstrated how little California, even under its looser regulatory system, would have to do to meet the active supervision prong of the test. The state's mere reservation of the right to inspect and modify, or reject, privately fixed rates constitutes active state supervision. 105 S. Ct. at 1723-24; see also dissenting opinion of Justice Stevens, 105 S. Ct. at 1739 n.23. Similarly, *Hoover v. Ronwin* showed that the "clear articulation" and "affirmative expression" prong of the

Midcal test is satisfied whenever the state's policy is expressed in a law. 104 S. Ct. at 1989.

Thus, even assuming the affirmation law involved or compelled concerted action to fix prices (a clearly anticompetitive result), the fact that the New York law required this, and reserved for the state the right to review and reject the prices fixed, would clearly immunize the law from invalidation under the Sherman Act.⁴³ The anomaly of immunizing anticompetitive statutory schemes from Sherman Act suit while permitting invalidation of the same statutes under the commerce clause would be compounded in cases involving a state's regulation of alcoholic beverages, where a commerce clause standard more deferential to the state is required. The Court should reject Brown-Forman's effort to have this Court adopt illogically inconsistent standards for dealing with allegedly anticompetitive state action under the commerce clause and the antitrust laws.

⁴³ New York not only reserves the right to review and reject the prices posted and affirmed under the challenged law, but such a rejection was the basis for the petition which commenced the proceedings in the courts below. J.S. App. 48a; A. 3-10.

CONCLUSION

For all the foregoing reasons, this Court should affirm the judgment of the New York Court of Appeals.

Dated: January 13, 1986
New York, New York

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REPLY BRIEF

IN THE
Supreme Court of the United States

October Term, 1985

BROWN-FORMAN DISTILLERS CORPORATION,

Appellant,

v.

STATE OF NEW YORK LIQUOR AUTHORITY,

Appellee.

**On Appeal from the Court of Appeals
of the State of New York**

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February 7, 1986

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No. 84-2030

IN THE
Supreme Court of the United States
October Term, 1985

BROWN-FORMAN DISTILLERS CORPORATION,

Appellant,

v.

STATE OF NEW YORK LIQUOR AUTHORITY,

Appellee.

On Appeal from the Court of Appeals
of the State of New York

REPLY BRIEF FOR APPELLANT

Introduction

This appeal is limited to a facial challenge to the constitutionality of the New York lowest-price liquor affirmation statute. While the briefs of appellee and the *amici curiae* supporting affirmance argue other issues,¹ Brown-Forman asserts only two grounds for its contention that the statute

1. The same references and abbreviations identified in the Brief for Appellant are continued in this reply. Appellee is sometimes referred to as "New York," and "NY," followed by page numbers, refers to its brief. The briefs of the *amici curiae*, The National Conference of State Legislatures and other local and state government organizations and Wine and Spirits Wholesalers of America, Inc., are referred to, respectively, as "NCSL" and "WSWA," followed by page numbers.

is facially in violation of the Commerce Clause and beyond the protection of the Twenty-first Amendment. Those grounds, each of which stands alone and is sufficient without the other, are (1) the New York statute extraterritorially regulates prices in other states and (2) it effects simple economic protectionism, conferring benefits upon New York wholesalers and consumers at the expense of those in other states.

Brown-Forman argues that these impermissible effects are inevitable upon the face of the statute and need not be otherwise established by evidence of record. "The principal focus of inquiry must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 37 (1980).

I

ON ITS FACE, NEW YORK'S PROSPECTIVE AFFIRMATION STATUTE UNCONSTITUTIONALLY IMPOSES A UNIFORM MINIMUM PRICE UPON ALL OF THE OTHER STATES BY LIMITING THE FREEDOM OF SUPPLIERS TO LOWER THEIR PRICES ELSEWHERE AT ANY GIVEN TIME, AND SUCH EXTRATERRITORIAL PRICE REGULATION IS NOT PROTECTED BY THE TWENTY-FIRST AMENDMENT

Appellee and the *amici curiae* supporting affirmance recognize the governing principle that, even without protectionist purpose or effect, extraterritorial regulation by a state is unconstitutional under the Commerce Clause:

[T]he traditional Commerce Clause principle [is] that a state may not regulate transactions occurring wholly outside its territory . . .

NCSL 11, and

Even a valid state objective accomplished by an even-handed regulation may be *per se* invalid if the measure more than incidentally affects or burdens interstate

commerce, by directly regulating it, *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935). . . .

NY 17. See also WSWA 8-14.

They urge, however, that the New York affirmation statute does not control prices in other states and thus lacks extraterritorial impact. They distinguish *United States Brewers Ass'n, Inc. v. Healy*, 692 F.2d 275 (2d Cir. 1982), *aff'd mem.*, 464 U.S. 909 (1983), arguing that the Connecticut beer affirmation statute held unconstitutional there was an absolute, unyielding extraterritorial regulation of minimum prices in other states, while the New York law lacks any such effect.

A. The Plain Meaning And Inevitable Impact Of The Statute Are That New York, By Obligating Suppliers Not To Sell Elsewhere At Any Lower Price Than That Previously Posted, Controls The Minimum Prices Everywhere

Appellee and its supporting *amici* ignore the clear language and certain effect of New York's prospective affirmation statute. They characterize it as requiring only a "current" or "contemporaneous" equation of the prices charged to New York wholesalers with the lowest prices charged anywhere else at the same time; they deny that the statute is prospective and therefore extraterritorial. NY 7-9; NCSL 7-9; WSWA 9. Disregarding the extraterritorial effect of its law, New York omits from its brief any quotation of the statutory language. New York simply neglects the *in futuro* control of suppliers' prices in every other state explicit upon the face of the statute.

The statute requires that the supplier's price posted in New York and accompanied by a verified affirmation must be "no higher than the lowest price at which such item of liquor will be sold . . . to any wholesaler anywhere in any other state . . . at any time during the calendar month for which such schedule shall be in effect. . . ."

ABC Law § 101-b, subd. 3(d); J.S. App. 53a. The Connecticut beer affirmation statute invalidated in *Healy* is indistinguishable. It required an affirmation that the posted price to wholesalers there must be "no higher than the lowest price at which each such item of beer is or will be sold . . . to any wholesaler in any state bordering [Connecticut], at any time during the calendar month covered by such posting." 692 F.2d at 277 n.5.

The *Healy* court determined that on its face such a prospective statute violates the Commerce Clause, because its inevitable extraterritorial impact is to prevent sales in other states at lower prices than those previously posted in the regulating state.² 692 F.2d at 282. That determination applies equally to New York's prospective affirmation law and undermines the contentions that the New York statute's "pricing mechanism is totally dependent upon a distiller[s] initially setting its price in other states;" that it "leaves total discretion over the setting of out-of-state prices to the distiller;" and that it "regulates sales in New York only," "merely prohibits the higher-price sale in New York," and does "not set prices in other states." NY 19 n.25, 20; WSWA 9, 13; NCSL 4. See also NY 18; NCSL 14.

On its face, the New York statute does far more than merely regulate sales within its borders or insure that prices to New York wholesalers are as low as those currently or contemporaneously charged elsewhere. Just as the Connecticut statute did in *Healy*, New York's prospective affirmation requirement tells suppliers that during each calendar month they cannot lower their prices on out-of-state sales below those previously posted in New York. Thus, New York effectively sets the same minimum prices in other states for transactions wholly outside New York and having no nexus with it.

2. See Brief for Appellant at 26-28.

B. If Suppliers Must Suspend Sales In New York To Reduce Prices In Other States, The Extraterritorial Reach Apparent On The Face Of The Statute Is Further Confirmed

The *amici* argue that the New York statute lacks the forbidden extraterritorial effect, because purportedly a supplier may at any time suspend sales in New York if it chooses to reduce its prices elsewhere. WSWA 13-14; NCSL 14 n.20. The same claim could have been made as to the Connecticut statute in *Healy*, but that statute was nevertheless found to impose unlawful minimum prices upon other states. More importantly, the argument emphasizes the undeniable extraterritorial regulation imposed by the prospective affirmation requirements of New York and other states. The argument, if sound, establishes that suppliers cannot sell elsewhere at a lower price than posted in New York.

C. If Suppliers Must Obtain The SLA's Prior Written Permission For "Good Cause" Shown To Make Mid-Month Price Reductions In Other States, They Are Not Free To Lower Their Prices Elsewhere "At Any Time" And The Extraterritorial Impact Manifest Upon The Face Of The Statute Is Unequivocally Established

New York and the *amici* urging affirmance assert that *Healy* should be distinguished, because purportedly the Connecticut and New York affirmation requirements are different. The local and state government organizations argue:

The Connecticut statute required current affirmation and allowed no waiver. New York's affirmation provisions, however, specifically allow liquor to be sold in New York at a price other than the posted price if "prior written permission of [the State Liquor Authority] is granted for good cause shown and for reasons not inconsistent with the purpose" of the statute. ABC Law § 101-b(3)(a).³ Because the State Liquor

3. See J.S. App. 53a.

Authority ("SLA") has the authority to allow liquor sales in New York at prices lower than those initially posted in order to take into account a mid-month price reduction in another state, the New York affirmation provisions in no way inhibit a distiller from reducing its prices in other states at any time; it must merely apply to the SLA for permission to make a corresponding reduction in its New York prices. Thus, any possible invalidity of Connecticut's scheme is irrelevant here, because New York's affirmation provisions have no effect on the minimum price charged for liquor outside of the state's borders.

NCSL 11-12 (footnotes omitted). Similarly, New York urges that pursuant to the "good cause" waiver provision "a distiller might request permission to raise or lower its posted and affirmed price in the middle of a month." NY 34. See also WSWA 14.

This "good cause" argument is self-destructive, because it establishes beyond cavil the inevitable extraterritorial reach of the New York affirmation statute apparent upon its face. Implicit in that argument is the admission that New York prospectively obligates suppliers not to charge any lower price elsewhere once they have posted prices to be charged to New York wholesalers. The argument establishes New York's control of the minimum prices which can be charged in all the other states; it concedes that before any mid-month price reduction can be made anywhere else a supplier must first seek and obtain the written permission of New York's SLA. That is patently extraterritorial regulation, because New York is directly controlling the minimum price that may be charged by non-New York suppliers to non-New York wholesalers in sales transactions wholly outside New York.

Contrary to the contention, therefore, suppliers are not free to lower prices elsewhere "at any time." Without

violating the New York statute, they cannot lower prices in other states below those affirmed in New York at least for the time necessary to seek and obtain written permission from the SLA, even assuming that the agency exercises its discretion in favor of such an application. Extraterritorial regulation of prices in other states for a shorter rather than longer period is no less a violation of the Commerce Clause. The Constitution draws no distinction between short-term and long-term regulation by a state outside its own territory anymore than ~~it~~ constitutionally is determined by the number of states affected by such usurpation of their jurisdiction.⁴ As the Second Circuit concluded in *Healy*, no state can constitutionally "limit the freedom of a manufacturer at any given time to raise or lower prices in any other state." 692 F.2d at 283.

D. Neither New York Judicial Precedent Nor SLA Practice Supports The "Good Cause" Argument That Suppliers Are Free To Make Mid-Month Price Reductions And Lower Their Prices At Any Time Below Those Previously Posted In New York

No New York state court has ever interpreted the "good cause" provision of the posting or affirmation requirements as allowing mid-month price reductions in other states below the previously posted New York price. In rejecting Brown-Forman's constitutional challenge based upon the affirmation statute's extraterritorial effect, the Court of Appeals, New York's highest court, did not even mention the "good cause" waiver provision. J.S. App. 6a-10a. Furthermore, New York cites no SLA administrative ruling or practice demonstrating that it has ever permitted a supplier to lower prices in any other state

4. Cf. *Joseph E. Seagram & Sons, Inc. v. Gazzara*, 610 F. Supp. 673, 677 n.4 (S.D.N.Y.), appeal pending, No. 85-7547 (2d Cir. July 1, 1985) ("The inquiry required by *Healy* . . . is whether a statute effectively regulates pricing in other states; the number of states involved is irrelevant") (court's emphasis).

during the middle of a month.⁵ There is no basis, therefore, for assuming that the SLA has applied the "good cause" provision as a purported means for curing the extraterritorial impact evident on the face of the statute.

Apparently the first time such an interpretation was ever considered was when the New York Attorney General argued in *Joseph E. Seagram & Sons, Inc. v. Gazzara*, 610 F. Supp. 673 (S.D.N.Y.), *appeal pending*, No. 85-7547 (2d Cir. July 1, 1985), that the "good cause" provision afforded a basis for distinguishing *Healy*. Accepting that contention, the district court concluded that, purportedly unlike the Connecticut statute, the "good cause" provision made the New York statute "susceptible of an interpretation" which would not "prohibit manufacturers from raising or lowering prices in other states." 610 F. Supp. at 678. To reach that conclusion, the federal court was forced to make sweeping, unsupported assumptions as to how the SLA could apply the provision to allow mid-month price reductions in other states. *Id.* at 677. Neither before the *Gazzara* court nor this Court, however, is there any showing that the SLA has ever done so.⁶

5. Cf. *In the Matter of House of Seagram, Inc. v. State Liquor Authority*, 26 A.D.2d 456, 275 N.Y.S.2d 609 (3d Dep't 1966) (holding that there were no SLA procedures governing changes in posted prices and that a hearing was required to determine whether the supplier had good cause to depart from the posted price which would not violate the legislative policy).

6. The local and state government *amici* suggest that in *Gazzara* the SLA applied the "good cause" provision to allow Seagram to make mid-month price discounts in other states. NCSL 12 n.15. The Attorney General's brief to the Second Circuit, however, belies that suggestion. When the quantity discounts to be given elsewhere by Seagram were rejected by the SLA for New York, Seagram, well before the month they were to become effective, filed amended price schedules for New York to reflect the cash equivalent of the extra bottle to be given elsewhere during the following month. Brief for Defendants-Appellees at 7-10, 21n. Thus, no mid-month price reduction in other states was involved.

E. The New York Courts Would Hold That The "Good Cause" Provision Does Not Authorize The SLA To Permit Mid-Month Departures From The Prices Posted In New York To Allow Price Reductions Elsewhere, Because Such Permission Would Conflict With The Legislative Purpose Of Insuring That All New York Wholesalers Pay The Same, Non-Discriminatory Prices For Liquor During Each Month-Long Posting Period

Brown-Forman submits that the New York courts would reject *Gazzara's* interpretation of the "good cause" provision, because that interpretation conflicts with the legislative policy that liquor must be sold to all New York wholesalers at the same, non-discriminatory prices.

The section of New York's ABC Law which requires price posting and affirmation is titled, "Unlawful discriminations prohibited; filing of schedules:" It bans all price discrimination, direct and indirect, between New York wholesalers.⁷ ABC Law § 101-b, subd. 2; J.S. App. 52a. These in-state non-discrimination provisions reflect New York's long-standing, strong policy against price discrimination between its wholesalers. 1942 N.Y. Laws ch. 899, § 1; see also *Battipaglia v. New York State Liquor Authority*, 745 F.2d 166, 168 (2d Cir. 1984), *cert. denied*, 105 S.Ct. 1393 (1985).

The "good cause" provision requires that permission to depart from posted prices can be granted only "for reasons not inconsistent with the purpose" of the same chapter of the ABC Law which includes both the non-discrimination and affirmation provisions. ABC Law § 101-b, subd. 3(a). J.S. App. 53a. Avoiding discrimination in the prices charged one New York wholesaler and another is just as much the "purpose" of the statutory provisions which include affirmation as avoiding discrim-

7. The sole exceptions are a maximum two percent quantity discount and a one percent discount for payment within ten days of shipment. *Id.*

ination between New York wholesalers and those in other states. That purpose would be inconsistent with granting permission for mid-month departure from the prices posted in New York in order to allow the lowering of prices elsewhere.

To authorize mid-month price decreases in New York to permit suppliers to lower prices in another state would result in *de facto* discrimination between those New York wholesalers buying earlier and those buying later in the month. It would thus defeat the orderly marketing objective of ABC Law § 101-b, subd. 4, which provides that the posted prices "shall be in effect" for the calendar month. J.S. App. 54a. That provision insures that all wholesalers will know and be able to rely upon the month-long mandatory price and that none will attain a discriminatory advantage, because there will be no price change until the next month's posting makes it available to all.

In *Battipaglia*, Judge Friendly concluded:

[The New York Legislature] expressly found that "price discrimination and favoritism are contrary to the best interests and welfare of the people of this state" There can be no doubt that requiring wholesalers to post their prices and to observe them for a month is an effective way, perhaps the only really effective way, of enabling the SLA to prevent price discrimination.

745 F.2d at 178. That conclusion is equally applicable to the non-discrimination policy underlying the same month-long adherence to posted prices which ABC Law § 101-b, subd. 4 imposes upon suppliers as well as wholesalers. J.S. App. 54a.

F. This Court's References To The "Good Cause" Provision In *Seagram v. Hostetter* Do Not Sustain New York's Statute And Its Unconstitutional Control Of Prices In Other States

New York's claim that in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966), "this Court discussed this 'good cause' provision at length in two different portions of the opinion and concluded that it provided New York with flexibility to prevent the statute from having burdensome extraterritorial effects and encroaching upon federal interests" (NY 13 n.20) is incorrect. The Court's references to the "good cause" provision in *Seagram v. Hostetter* did not pertain even to the different Commerce Clause issues raised there in connection with the original retrospective affirmation statute (which required affirmation of the lowest price charged elsewhere in the previous month and left suppliers free at any time to lower prices in other states below the affirmed New York price).

As the opinion demonstrates, the Court was examining the original affirmation statute against Supremacy Clause claims of hypothetical and attenuated conflict with the Robinson-Patman Act. 384 U.S. at 45-46. Patently, the Court's discussion of the "good cause" provision in that wholly different context offers no support for the argument that the "good cause provision" cures New York's amended prospective statute from the unconstitutional extraterritorial imposition of minimum prices in other states so apparent on its face.

G. The "Good Cause" Provision Cannot Cure New York's Impermissible Regulation Of Prices In Other States, Because An Administrative Agency's Discretion To Modify The Otherwise Unconstitutional Effect Of A Statute Will Not Save It

A statute unconstitutional on its face should not be sustainable merely because a state agency is claimed to have the discretion to waive or modify the statute's other-

wise unconstitutional impact. *Cf. Public Utilities Commission v. United States*, 355 U.S. 534 (1958); *Lewke v. Farmers Grain Co.*, 258 U.S. 50 (1922) (statute which did not set, but merely gave state inspectors discretion to set, profit margins on out-of-state sales of wheat purchased in-state was facially violative of Commerce Clause).

H. *Healy* Correctly Applies This Court's Decisions And Its Analysis Is Controlling Here, While *Seagram v. Hostetter* Is Distinguishable And The Court's Statement There That New York May Constitutionally Insist Upon Price Parity By Virtue Of Its Regulatory Power Under The Twenty-first Amendment Is Limited To Non-Prospective Affirmation Requirements Which Impose No Extraterritorial Price Regulation Upon Other States

Even if applied as appellee and the *amici* hypothesize, the "good cause" provision does not change the inevitable facial effect of New York's affirmation statute. The statute would impose the same minimum price floor on liquor sales to buyers in every other state unless New York first granted permission to charge lower prices. For purposes of constitutional analysis, therefore, it is not different than the Connecticut statute struck down in *Healy* by the Second Circuit. Moreover, that decision is not distinguishable on any other grounds. Its analysis is sound and entirely consistent with the decisions of this Court.⁸

The opinion in *Healy* makes clear (692 F.2d at 281-82) and New York and its supporting *amici* agree that the decision there did not turn upon the protectionist or discriminatory character of the Connecticut statute. NY 33-34; WSWA 22 n.14; NCSL 15 n.22. Even if the New York statute were not also protectionist or discriminatory, there-

8. See *Healy*, 692 F.2d at 278-82; Brief for Appellant at 12-15, 27-28; NCSL 11 ("The [*Healy*] court invalidated the Connecticut statute according to the traditional Commerce Clause principle that a state may not regulate transactions occurring wholly outside its territory").

fore, the *Healy* rationale applies and is sufficient to hold it unconstitutional.

Healy did not distinguish *Seagram v. Hostetter* "in an illogical and demonstrably erroneous fashion." NY 34. The Second Circuit correctly recognized the decisive difference between the effect of New York's original retrospective statute, which geared affirmation to the lowest price charged in the month preceding posting, leaving suppliers free to determine the prices they would charge at any time in other states, and the impermissible extraterritorial impact of prospective statutes, which obligate suppliers every month not to lower their prices anywhere after they have posted a price in the regulating state.

The Second Circuit did not disregard the meaning of this Court's statement in *Seagram* that "New York may constitutionally *insist* that liquor prices to domestic wholesalers . . . be as low as prices offered elsewhere in the country." NY 34. The *Healy* court recognized, just as this Court had, that New York's original retrospective lowest price requirement "did not limit the freedom of a manufacturer at any given time to raise or lower prices in any other state." 692 F.2d at 283.

In that context, this Court's statement meant only that New York could insist upon prices equal to the lowest previously charged, because there would then be no extraterritorial regulation of the prices charged in other states. If that were not the meaning, this Court would not have made the Twenty-first Amendment—which grants authority to the states to regulate liquor only within their own borders—the starting point and sole basis for its decision

9. The district court in *Gazzara* did not recognize "that the reasoning in . . . *Healy* could not be reconciled with the reasoning of *Seagram*. . . ." NY 34. It accepted the rationale of *Healy*, but concluded that on its face the New York statute does not prohibit suppliers from lowering their prices in other states because of the "good cause" provision. 610 F. Supp. at 676-77. This Court will resolve that issue on this appeal.

that no illegal burden upon interstate commerce was apparent on the face of the original statute examined in *Seagram*. 384 U.S. at 41-43. As New York states, in *Seagram* this "Court found that the law was enacted within the central grant of power to the states under the twenty-first amendment." NY 39, citing *Seagram*, 384 U.S. at 42. To the same effect, see NCSL 8.

In short, the meaning of the Court's statement was that absent extraterritorial impact New York's insistence upon prices as low as charged elsewhere was a legitimate objective by virtue of the Twenty-first Amendment authority given to the states to regulate the liquor trade solely within their own borders. The Court was not saying that New York could constitutionally impose extraterritorial price minimums upon any other state by prospectively requiring suppliers to agree not to lower their prices elsewhere below the price previously posted in New York. That is the wholly different issue presented on this appeal, which is therefore neither the same case as nor a reargument of *Seagram*. Compare NY 11-12, 14.

I. Because Of Its Extraterritorial Price Regulation, New York's Prospective Affirmation Statute Is Not Protected By The Twenty-first Amendment

Finally, if the Court finds that the prospective New York affirmation statute extraterritorially regulates prices in other states, contrary to *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), and the other cases cited in appellant's brief, then there is no Twenty-first Amendment protection available. The issues raised by New York and the amici supporting affirmance as to what state interests other than temperance are protected by the Amendment become irrelevant if the affirmation statute is unconstitutional because of its extraterritorial regulation of prices in other states.

New York and the amici do not appear to take issue with the fact that this Court's decisions unequivocally establish that a state cannot regulate liquor sales beyond its own borders. See *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964); *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 538 (1938); *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 299 (1945) (Amendment does not permit regulation by the states of "the conduct of persons doing an interstate liquor business outside their boundaries"). The teaching of these decisions was appropriately applied to Connecticut's essentially identical statute by the Second Circuit in *Healy* and is equally germane to New York's prospective affirmation requirement: "Nothing in the Twenty-first Amendment permits Connecticut to set the minimum prices for the sale of beer in any other state, and well-established Commerce Clause principles prohibit the state from controlling the prices set for sales occurring wholly outside its territory." 692 F.2d at 282.

II

ON ITS FACE, NEW YORK'S PROSPECTIVE AFFIRMATION STATUTE IS UNCONSTITUTIONAL, BECAUSE IT IS ALSO SIMPLE ECONOMIC PROTECTIONISM, IN PER SE VIOLATION OF THE COMMERCE CLAUSE AND NOT PROTECTED BY THE TWENTY-FIRST AMENDMENT

A. Because The Statute Benefits New York's Economic Interests At The Expense Of Business And Consumers In Other States By Regulating And Distorting Price Competition Everywhere, It Is Protectionist And Discriminatory

The extraterritorial control of minimum prices which the New York statute imposes upon other states is alone sufficient to hold it unconstitutional. Brown-Forman will reply only briefly, therefore, to the contentions that the statute is not, in addition, simple economic protectionism,

a virtually *per se* violation of the Commerce Clause not saved by the Twenty-first Amendment.

The issue presented is primarily definitional, *i.e.* what is the scope of the protectionist concept? The *Gazzara* court would limit it to those state regulations which, by purpose or effect, promote the economic interests of local businesses or consumers and discriminate against those of non-residents by prohibiting or discouraging the importation from, or the export to, other states of articles of commerce. 610 F.Supp. 678-80. Only statutes which "constitute state interference with competition between local and out-of-state industries" fall within that court's definition of protectionism.¹⁰ *Id.* at 679.

Concededly, in many, if not most, of the cases in which this Court has held state regulation to be economic protectionism, the character of the regulation has fit that definition. The Court's decisions, however, show that such a definition is too limited and that the forbidden protectionism includes other types of regulation. The protectionist ban also applies to state regulation which—while it does not interfere with the competition between local and out-of-state businesses—nevertheless confers a benefit upon local

10. New York and the amici supporting affirmance offer similar definitions. NY 17, 24; WSWA 5, 15, 18; NCSL 15-17. For example, appellee argues that in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), the Court upheld Maryland's bounty payments for auto hulks in spite of its more stringent title requirements upon out-of-state processors "because Maryland's exercise of 'the right to favor its own citizens over others' was accomplished without a 'trade barrier of the type forbidden by the commerce clause,' *i.e.*, one which impedes the movement of goods into or out of the state." NY 25. *Hughes* does not support that position. Finding that Maryland entered the market as a purchaser, the Court concluded that the Commerce Clause does not restrict a state's activities when it is a market participant rather than a market regulator. 426 U.S. at 806-10. As the Court subsequently reiterated in *South-Central Timber Development, Inc. v. Wunnicke*, 104 S.Ct. 2237, 2243 (1984) (citing *Hughes*), "Our cases make clear that if a State is acting as a market participant, rather than as a market regulator, the dormant Commerce Clause places no limitation on its activities."

economic interests and discriminates against business or consumers in other states by depriving them of competitive advantages they could otherwise enjoy.

Buck v. Kykendall, 267 U.S. 307 (1925), one of the earliest protectionist decisions, was such a case. There Washington denied its own citizen a license to operate an interstate common carrier between Seattle and Portland, Oregon, on the ground that there was adequate service already available. That regulation was evenhanded and did not discriminate against out-of-state businesses. The local economic interest promoted was the protection of Washington licensees from competition, even though the competition was that of an in-state business.

At the same time, the Washington statute extraterritorially deprived Oregon consumers of the benefits of the additional competition which Oregon had authorized. In striking down the Washington statute because its "primary purpose [was] . . . the prohibition of competition" (267 U.S. at 315), the Court stated:

The vice of the legislation is dramatically exposed by the fact that the State of Oregon had issued its certificate which may be deemed equivalent to a legislative declaration that, despite existing facilities, public convenience and necessity required the establishment by Buck of the auto stage line between Seattle and Portland. Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the Commerce Clause.

267 U.S. at 316.

The New York affirmation statute, even though it does not restrain imports or exports and thus inhibit competition between in-state and out-of-state suppliers, extraterritorially burdens interstate transactions wholly outside New York's borders. It requires suppliers to surrender

their freedom to compete elsewhere during each monthly posting period, and it thus deprives wholesalers and consumers in other states of the right to bargain for the lower prices which competition could provide them. While thus subjecting buyers in other states to higher-than-competitive prices, New York benefits its own by demanding the lowest prices anywhere even though New York prices might be higher if New York left the forces of competition in its markets unregulated.

Seagram v. Hostetter supports the broader definition of economic protectionism. Considered against the *Gazzara* definition, the retrospective affirmation requirement in *Seagram* neither discouraged liquor movement into or out of New York nor constituted interference with competition between local and out-of-state industries any more than New York's prospective statute now does. Notwithstanding that fact, in *Seagram* the Court concluded that, upon a proper factual showing rather than a facial challenge, even affirmation geared to the preceding month's lowest price could have sufficient extraterritorial impact to make that kind of regulation discriminatory and *per se* invalid under the Commerce Clause, removing it from the ambit of the Twenty-first Amendment.¹¹ The Court declared:

We need not now decide whether the mode of liquor regulation chosen by a State [for the in-state distribution of liquor] could ever constitute so grave an interference with a company's operations elsewhere as to make the regulation invalid under the Commerce Clause. See *Baldwin v. G.A.F. Seelig*, 294 U.S. 511 The serious discriminatory effects of § 9 alleged by appellants on their business outside New York are largely matters of conjecture. It is by no means clear, for instance, that § 9 must inevitably produce higher prices in other States, as claimed by appellants, rather than the lower prices sought for New York. It will

11. Appellee appears to agree with this reading of *Seagram*. See NY 38.

be time enough to assess the alleged extraterritorial effects of § 9 when a case arises that clearly presents them.

384 U.S. at 42-43 (footnotes omitted).

The mode of liquor regulation now chosen by New York is so grave an interference with suppliers' operations elsewhere as to invalidate it. The inevitable effect of New York's prospective affirmation requirement is that, akin to the facts in *Baldwin v. Seelig*, New York impermissibly sets minimum prices at which liquor must be sold in other states. It thus neutralizes and strips away from wholesalers and consumers elsewhere the competitive and economic advantages which free market forces there could afford in the form of lower prices.

At the same time, New York twists the competitive balance to insure that its economic interests are served by forcing upon suppliers the lowest prices anywhere as the condition to allowing their brands within its borders. The effect of requiring lower prices than would result from the competitive forces of its marketplace is not economically different than if New York insisted upon discriminatory, lower prices than those charged in any other state.

Even if the Twenty-first Amendment authorized New York to dictate whatever liquor price it chose absent its regulation of prices in other states, its prospective affirmation requirement conflicts with the Commerce Clause. The necessary effect of the New York statute's extraterritorial control of minimum prices in all of the states is discriminatory, economic protectionism which benefits New York residents at the expense of those elsewhere by regulating and distorting price competition in the spirits markets everywhere.¹²

12. In *Gazzara*, although viewing the statute as lacking extraterritorial effect, the court concluded that even such a statute may arguably have "a significant anti-competitive effect." 610 F.Supp. at 680.

**B. Because It Constitutes Mere Economic Protectionism,
The New York Statute Is Not Protected By The
Twenty-first Amendment**

In addition to the fact that the Twenty-first Amendment does not authorize state regulation of liquor sales beyond its borders, the Amendment is unavailable to protect New York's affirmation statute because its necessary extraterritorial effect also establishes that it constitutes economic protectionism and discrimination in *per se* violation of the Commerce Clause. In *Bacchus Imports, Ltd. v. Dias*, 104 S.Ct. 3049 (1984), the Court has made clear that whatever state interests other than the promotion of temperance may fall within the purposes of the Amendment, economic protectionism is not one of them:

State laws that constitute mere economic protectionism are . . . not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor.

104 S.Ct. at 3058.

Conclusion

For the reasons outlined here and in its principal brief, appellant urges the Court to hold the New York affirmation statute unconstitutional on its face and to reverse the judgment below.

Respectfully submitted,

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February 7, 1986

AMICUS CURIAE

BRIEF

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Supreme Court, U.S.

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No. 84-2030

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

BROWN-FORMAN DISTILLERS CORPORATION,
Appellant,
v.

STATE OF NEW YORK LIQUOR AUTHORITY,
Appellee.

On Appeal from the Court of Appeals
of the State of New York

BRIEF OF AMICUS CURIAE
THE WINE INSTITUTE

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**On Appeal from the Court of Appeals
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**BRIEF OF AMICUS CURIAE
THE WINE INSTITUTE**

INTEREST OF AMICUS CURIAE

The Wine Institute is a voluntary nonprofit trade association, organized under the laws of the State of California. It includes among its 498 members approximately 90 percent of the licensed wineries in California. Its members ship wines to customers throughout the country. The particular New York price affirmation statute whose constitutionality is at issue in this case does not cover wine, but wine is subject to affirmation statutes

in other states.¹ The legal principles established by the Court's decision in this case will have a strong if not decisive impact on the constitutionality of those statutes. The wine affirmation statutes interfere with interstate commerce in wine and wine products, and the members of the Wine Institute have a vital interest in removing the burdens on interstate commerce that those statutes impose.²

SUMMARY OF ARGUMENT

The New York liquor price affirmation statute is unconstitutional on its face. Its ostensible purpose is to regulate prices in New York, but it has the effect and necessary operation of exporting New York's liquor prices to other states. Standing alone, the statute mandates a national minimum price, requiring that sales throughout the country take place at a price at least as high as the posted New York price for that month. Combined with the statutes of other states, the New York statute creates a rigid national pricing structure. Because of the New York statute and other states' reprisals in kind, the forces that govern a distiller's pricing decisions are the antithesis of the free play of market forces in a national economy. Today, in transactions throughout the United States, no purchaser may bargain for, and no national distiller may grant, a price advantage justified by economic or geographic position. This case and the effects of this statute present the constitutional issues left open in *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35 (1966).

¹ Conn. Gen. Stat. Ann. 30-63b (West Cum. Supp. 1985); Kan. Stat. Ann. §§ 41-1101, -1112 (1981 & Cum. Supp. 1984); Mass. Gen. Laws Ann. ch. 138, § 25D (1974 & Cum. Supp. 1985); R.I. Gen. Laws § 3-6-14.1 (1976); Tenn. Code Ann. § 57-3-202(e) (2) (1980).

² This brief *amicus curiae* is filed in support of appellant Brown-Forman Distillers Corporation. It is accompanied by the written consents of the parties.

The statute, by regulating prices outside New York, violates the Commerce Clause. The Commerce Clause forbids extraterritorial regulation of price, including a demand of "price parity." The extraterritorial effects of New York's price parity demand are not incidental to the statute; they are the heart of the statute's requirement that New Yorkers obtain the lowest liquor prices in the nation. That requirement is simple economic protectionism for New York consumers, and its achievement is beyond the power of the New York Legislature. The statutes passed in other states since 1966 as responses to New York's lowest-price demand confirm that the New York statute has prompted the very kind of jealousy and retaliation that the Commerce Clause was meant to end.

The Twenty-first Amendment does not validate New York's affirmation statute and indeed underscores its invalidity. The Twenty-first Amendment did not repeal the Commerce Clause; instead, when the Commerce Clause and the Twenty-first Amendment conflict, state and federal interests must be balanced. But, although New York may control some aspects of pricing within the state, there is nothing to be balanced in favor of New York's *extraterritorial* regulation of liquor prices, since this Court has repeatedly held that the Twenty-first Amendment does not empower a state to regulate liquor outside its own borders. In fact, one fundamental purpose of the Twenty-first Amendment was to protect states from other states' export of their policies with respect to liquor. The Twenty-first Amendment teaches that other states should be protected *from* New York's extraterritorial statute; it does not save the statute.

ARGUMENT

I. THE NEW YORK STATUTE CONTROLS PRICING IN OTHER STATES

The current New York affirmation statute requires each distiller to post a schedule of prices and to affirm that the listed prices will be "no higher than the lowest price at which such item of liquor will be sold . . . to any wholesaler anywhere in . . . the United States . . . at any time during the calendar month for which such schedule shall be in effect."³ Its extraterritorial effect can best be understood in historical context.

The history of the New York statute begins in 1950, when New York enacted a minimum resale price law for alcoholic beverages. The law prohibited retail sales below the prices fixed in schedules filed by companies with the State Liquor Authority.⁴ Thereafter, a Commission appointed by the Governor of New York in 1963 "found that New York liquor consumers had been the victims of serious discrimination because of the higher prices and reduced competition fostered by the mandatory minimum price maintenance provision of the law."⁵ The Commission's recommended solution was to repeal the resale price maintenance provisions, but the New York Legislature went further.⁶ It passed a statute, the predecessor of the statute at issue in this case, that required that any company selling to wholesalers in New York affirm that its posted price for sales in New York was "no higher than the lowest price" of any sale in the United States in the preceding month.⁷

³ N.Y. Alco. Bev. Cont. Law § 101-b(3)(d) (McKinney 1970).

⁴ Laws 1950, ch. 689, § 1 (formerly codified at N.Y. Alco. Bev. Cont. Law § 101-c); see *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35, 38 & n.7 (1966).

⁵ *Seagram*, 384 U.S. at 39.

⁶ *Id.*

⁷ *Id.* at 41.

This Court heard a challenge to that statute during the 1965 Term. *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35 (1966). At that time the statute was a novel one, paralleled in only one other state,⁸ and the Court noted that it was addressed to a special problem that resale price maintenance had created. Although it upheld the statute, the Court, citing *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), left open the question "whether the mode of liquor regulation chosen by a State in such circumstances could ever constitute so grave an interference with a company's operations elsewhere as to make the regulation invalid under the Commerce Clause" and declared: "It will be time enough to assess the alleged extraterritorial effects of § 9 when a case arises that clearly presents them."⁹

In the years that followed, states other than New York sought the benefit of the *Seagram* decision. If New York could constitutionally demand the lowest prices in the country, so could they. Thus, additional affirmation statutes were enacted. Some, such as a 1966 Massachusetts law,¹⁰ were "retrospective" like the original New York statute, focusing on prices in other states during a prior

⁸ See Kan. Stat. Ann. § 41-1112 (1981) (adopted 1961). Kansas, however, has never required that prices be posted.

⁹ 384 U.S. at 42-43. The Court rejected as "conjecture" claims that the statute would "inevitably produce higher prices in other States . . . rather than the lower prices sought for New York," *id.* at 43, and that "the burden of gathering information . . . required for the affirmations" was constitutionally intolerable, *id.* at 45. The Court also deferred to the New York Legislature's determination, based on "years of unhappy experience with a state-enforced mandatory resale price maintenance system," that "only by imposing the relatively drastic 'no higher than the lowest price' requirement of § 9 could the grip of the liquor distillers on New York liquor prices be loosened." *Id.* at 47-48.

¹⁰ Mass. Gen. Laws Ann. ch. 138, § 25D (1974).

month. Others, such as a 1967 South Carolina statute,¹¹ were prospective, requiring that a company affirm that it "shall not wilfully sell or offer for sale any alcoholic liquors . . . in any State of the United States at a price lower than the price such liquors are sold or offered for sale to licensed South Carolina wholesalers." As the affirmation statutes began to multiply, their extraterritorial effects manifested themselves in several different ways.

First, the extraterritorial effects became clear when conflict arose between the retrospective and prospective statutes. If, for example, a seller wished to increase its price in South Carolina, it could only do so by not selling elsewhere in the same month at a lower price. But, because the New York statute required that the lowest price from the previous month be charged, the required price in New York would be lower than the intended price in South Carolina, and a statutory violation would occur. The only solutions were to discontinue sales in New York (and all other "retrospective" affirmation states) for the month of the price increase, or to forgo all price increases. The New York Legislature, recognizing the conflict from the interstate effects of these laws, changed its statute to a prospective one.¹²

Second, a prospective statute, which sets minimum prices for each month in states other than the enacting

¹¹ S.C. Code Ann. § 61-7-100 (Law. Co-op. 1977).

¹² See *Joseph E. Seagram & Sons v. Gazzara*, 610 F. Supp. 673, 675 n.3 (S.D.N.Y.), appeal docketed, No. 85-7547 (2d Cir. July 1, 1985). Other states that had initially passed retrospective affirmation statutes also amended their statutes to require prospective (or "concurrent") affirmation. See, e.g., Mass. Gen. Laws Ann. ch. 138, § 25D (Cum. Supp. 1985) (prospective statute replacing previous retrospective statute); see also *United States Brewers Association v. Rodriguez*, 104 S. Ct. 1581, 1582 (1984) (Stevens, J., concurring).

state, has a decisive extraterritorial impact of its own. The United States Court of Appeals for the Second Circuit recognized this extraterritorial impact in *United States Brewers Association v. Healy*, 692 F.2d 275 (2d Cir. 1982), *aff'd mem.*, 464 U.S. 909 (1983). There the court considered a Connecticut statute that required each brewer to "file a sworn affirmation that its posted per-unit prices [for beer] will be no higher than its prices for the corresponding units sold in any state bordering Connecticut during the month covered by the posting."¹³ The court found that it was "evident that the Connecticut statute seeks to regulate prices not just in Connecticut but in its surrounding states as well," and "plain" that the statute had an "extraterritorial thrust." The court said:

[T]hese sections tell a brewer that for any given month when it sells beer to a wholesaler in Massachusetts, New York, or Rhode Island, it may not do so at a price lower than it has previously announced it will charge to Connecticut wholesalers Thus, the obvious effect of the Connecticut statute is to control the minimum price that may be charged by a non-Connecticut brewer to a non-Connecticut wholesaler in a state outside of Connecticut.¹⁴

Connecticut's statute affected prices only in Connecticut and three surrounding states. The reach of the New York statute is "nationwide in scope."¹⁵ Thus, once a price is posted for New York, the New York statute requires wholesalers in New Jersey to pay at least that posted price, requires wholesalers in Texas to pay at least

¹³ 692 F.2d at 277 (footnote omitted).

¹⁴ *Id.* at 282. Therefore, the Court struck the statute down as unconstitutional.

¹⁵ *Brown-Forman Distillers Corp. v. State Liquor Authority*, 64 N.Y.2d 479, 488, 479 N.E.2d 764, 769, 490 N.Y.S.2d 128, 133 (1985).

that posted price, requires wholesalers in California to pay at least that posted price, etc.—just as if the New York Legislature had been sitting as a legislative body in each of the 49 other states and the District of Columbia.¹⁶

Third, as the number of affirmation statutes multiplied, a rigid and cumbersome extraterritorial pricing structure resulted. Today, New York's statute is parroted (with variations) in 20 other states. Nineteen of those states have prospective (or "concurrent") statutes or regulations like New York's.¹⁷ Thus, the 50-state *minimum* price that a distiller must determine because of the New York statute is also the *maximum* price (and therefore the *only* price) in 21 states by virtue of their retali-

¹⁶ Another state legislature that has imitated New York's statute has phrased its own law as just such a direct extraterritorial requirement: "The affirmation shall certify that the producer shall not wilfully sell or offer for sale any alcoholic liquors . . . in any State of the United States at a price lower than the price such liquors are sold or offered for sale to licensed South Carolina wholesalers." S.C. Code Ann. § 61-7-100 (Law. Co-op. 1977). In substance (if not in phraseology), New York's law is no less extraterritorial than South Carolina's.

¹⁷ Cal. Bus. & Prof. Code § 23673 (West 1985); Conn. Gen. Stat. Ann. § 30-63b (West Cum. Supp. 1985); Del. Code Ann. tit. 4, § 508(a) (1975); Fla. Stat. Ann. § 565.15(1) (West Cum. Supp. 1985); Ga. Rules and Regulations § 560-2-3-.47 (1982); Hawaii Rev. Stat. §§ 281-122, -123 (Cum. Supp. 1984); Kan. Stat. Ann. §§ 41-1101, -1112 (1981 & Cum. Supp. 1984); La. Rev. Stat. Ann. § 26:370(B) (West 1975); Md. Ann. Code art. 2B, § 109(c-1) (1981); Mass. Gen. Laws Ann. ch. 138, § 25D (1974 & Cum. Supp. 1985); Minn. Stat. Ann. § 340.114 (West Cum. Supp. 1985); Neb. Rev. Stat. §§ 53-170.02, .03 (1984); 1985 Nev. Assembly Bill No. 471 (to be codified at Nev. Rev. Stat. § 369.430); N.J. Admin. Code § 13:2-24.5(a)(3) (1984); Okla. Stat. Ann. tit. 37, § 536.1 (West Cum. Supp. 1984); R.I. Gen. Laws § 3-6-14.1 (1976); S.C. Code Ann. § 61-7-100 (Law. Co-op. 1977); S.D. Codified Laws Ann. § 35-4-95 (Supp. 1985); Tenn. Code Ann. § 57-3-202(c)(2) (1980). One state still has a retrospective statute. Ariz. Rev. Stat. Ann. § 4-253(A) (West Cum. Supp. 1984).

tory legislation and regulations.¹⁸ What began as an attempt to rectify the effects of state-mandated minimum resale price maintenance in New York has now led to a national price floor in 50 states and, together with other states' responsive actions, a single uniform price throughout many states.

The type of pricing structure that has evolved as a consequence of the affirmation statutes is the antithesis of the free play of market forces in a national economy. A distiller has no pricing mechanism available to recognize the efficiencies of dealing in different areas of the country. It is impossible to consider local product preferences or costs of doing business in setting price. Nor is there room for a distiller to meet the prices of local and regional competitors.¹⁹ And, of course, no purchaser outside of New York may bargain for a price advantage that is justified by its economic or geographic position.

¹⁸ In addition, 18 states purchase liquor from distillers and sell it to consumers themselves rather than permit the development of a private liquor industry. Almost all of these states use some type of contract provision requiring a warranty that the price charged to them will be no higher than the lowest price charged anywhere else in the nation. These contract provisions raise serious questions of their own, *see infra* note 33, but those issues are not now before the Court.

¹⁹ There are many such local and regional distillers. If Ed. Phillips & Sons Co., a regional distiller in Minneapolis, for example, instituted a price decrease in Minnesota on November 26, then a national distiller could not meet that decrease in the local market alone. The national distiller could not lower its price in Minnesota unless it was willing simultaneously to lower its price in New York (and other affirmation states)—where it does not compete with Ed. Phillips & Sons Co.—to the same level. Even assuming the distiller was willing to do so, it could not do so until February, since the New York statute requires that November prices be posted by September 25, December prices by October 25, and January prices by November 25. N.Y. Alco. Bev. Cont. Law § 101-b(4) (McKinney Cum. Supp. 1984).

The New York statute ostensibly regulates prices in New York. But the question presented is not whether New York may regulate prices within its borders, for New York has done more than that. As reflected in the language and necessary operation of its statute, New York seeks to ensure that prices in other states are at least as high as the New York price; and New York has chosen a means of price regulation that has substantial extraterritorial effects by exporting its prices to other states in transactions in which it has no interest. The questions presented are whether the Commerce Clause can tolerate such extraterritorial effects and whether the Twenty-first Amendment otherwise justifies them.

II. THE NEW YORK AFFIRMATION STATUTE, BY REGULATING PRICES OUTSIDE THE STATE, VIOLATES THE COMMERCE CLAUSE

The decisions of this Court make it plain that the Commerce Clause forbids all extraterritorial regulation of prices. As long ago as 1894, "[n]o principle [was] better settled than that the power of a State, even its power of taxation, in respect to property, is limited to such as is within its jurisdiction," and an attempt by Pennsylvania to regulate payments made by a railroad in New York was held unconstitutional.²⁰ In 1925, the Court held that regulation of in-state purchases with a view to preventing "unreasonable margins of profit" on out-of-

²⁰ *New York, Lake Erie & Western Railroad v. Pennsylvania*, 153 U.S. 628, 646 (1894); see also *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982) (plurality opinion) ("The limits on a State's power to enact substantive legislation [under the Commerce Clause] are similar to the limits on the jurisdiction of state courts. In either case, 'any attempt "directly" to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power.'" (quoting *Shaffer v. Heitner*, 439 U.S. 128, 197 (1977))).

state resale violated the Commerce Clause.²¹ And in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), the Court, in a "seminal opinion"²² by Justice Cardozo, unanimously struck down a New York attempt to apply New York's minimum price to a transaction in Vermont. *Seelig* has been consistently applied and reaffirmed in modern cases, including cases involving affirmation of alcoholic-beverage prices.²³ *Seelig* provides the Commerce Clause principles that govern this case.

In *Seelig*, New York attempted to dictate the minimum price at which a New York milk dealer could buy milk in Vermont from a creamery located in Vermont.²⁴ As in this case, the minimum price that New York attempted to dictate was identical to the price for similar transactions taking place in New York. Accordingly, the *Seelig* statute was no more vulnerable than the statute involved

²¹ *Shaffer v. Farmers Grain Co.*, 268 U.S. 189, 201 (1925).

²² L. Tribe, *American Constitutional Law* § 6-6, at 328 (1978).

²³ This Court cited *Seelig* in *Seagram*, 384 U.S. at 42-43, and summarily affirmed a Second Circuit decision relying heavily on *Seelig* to invalidate a Connecticut affirmation statute. *United States Brewers Association v. Healy*, 464 U.S. 909 (1983), *aff'g mem.* 692 F.2d 275, 283 (2d Cir. 1982). This Court has also summarily affirmed two decisions invalidating, on the authority of *Seelig*, attempts by Louisiana to regulate milk marketing extraterritorially. *Louisiana Dairy Stabilization Board v. Dairy Fresh Corp.*, 454 U.S. 884 (1981), *aff'g mem.* 631 F.2d 67 (5th Cir. 1980); *Louisiana Milk Commission v. Schweigmann Brothers Giant Super Markets*, 416 U.S. 922 (1974), *aff'g mem.* 365 F. Supp. 1144 (M.D. La. 1973) (invalidating attempt to require payment of Louisiana minimum prices for the sale of milk in Tennessee).

²⁴ The minimum price applied only to milk bought for resale in New York, whereas the New York liquor price affirmation statute attempts to set a minimum price for sales, e.g., from a Kentucky distiller to a California wholesaler, that are plainly in interstate commerce but have no connection whatsoever with New York.

in this case to criticism as "discriminatory."²⁵ Indeed, this Court recognized that its purpose and effect was "the creation of a parity of prices between New York and other states."²⁶ Yet, under the most basic principles of Commerce Clause jurisprudence, such a statute was impermissible: "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there."²⁷ "[C]ommerce . . . is burdened unduly when one state regulates by indirection the prices to be paid to producers in another" ²⁸

In *Seelig*, as in this case,²⁹ New York sought refuge in its power to burden commerce "incidentally" in order to serve legitimate state ends. But in neither case was the burden on interstate commerce "incidental" in the sense in which this Court has used the word. The extra-territorial price-regulating effect of New York's action in each case was wholly unrelated to health and safety concerns or other noneconomic goals. In each case, the central thrust of New York's action was to prevent prices

²⁵ See 64 N.Y.2d at 487-88, 479 N.E.2d at 768-69, 490 N.Y.S.2d at 132-33 (attempting to justify affirmation statute on the ground that it was designed to end rather than promote "discrimination").

²⁶ 294 U.S. at 524.

²⁷ *Id.* at 521.

²⁸ *Id.* at 524; see also *id.* at 528 ("In licensing or prohibiting the sale of intoxicating liquors a state does not attempt to neutralize economic advantages belonging to the place of origin. . . . It is a very different thing to establish . . . a scale of prices for use in other states").

²⁹ 64 N.Y.2d at 486, 479 N.E.2d at 768-69, 490 N.Y.S.2d at 131-32 ("Where, as here, legitimate State objectives are credibly advanced in support of the statute, where no patent discrimination against interstate trade exists, and where there is only an incidental impact on interstate commerce, a flexible approach . . . is employed.") (emphasis added).

in other states from "beating" the New York price. Thus, in *Seelig*, the Court observed:

[T]he borderland is wide between the restraints upheld as incidental and those attempted here. . . . None of these statutes [upheld as incidental restraints]—inspection laws, game laws, laws intended to curb fraud or exterminate disease—approaches in drastic quality the statute here in controversy which would neutralize the economic consequences of free trade among the states.³⁰

At least since *Seelig*, the Court has consistently distinguished health and safety regulation, whose incidental impact on interstate commerce may be permissible, from economic regulation itself.³¹

Nor does New York's statute serve a "legitimate" goal. Obtaining low prices may be a legitimate state goal, but that is not the goal served by the New York statute. The statute's purpose is embodied in the euphemism of "preventing continued discrimination" between residents of New York and those of other states³²—i.e.,

³⁰ 294 U.S. at 525-26.

³¹ See, e.g., *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 956 (1982); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978); *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 381 (1976) (provision burdening commerce, "insofar as justified by the State as an economic measure, is . . . hostile in conception as well as burdensome in result"); *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 533 (1949) (states "lack . . . power to retard, burden or constrict the flow of [interstate] commerce for their economic advantage"); see also *Bison, Economic Protective Powers of States Under the Commerce Clause*, 38 Geo. L.J. 590, 600 (1950) ("the opinion of the Court [in *Hood*] may be fairly taken as holding that the ban against states acting in defense of their 'economic' interest is absolute, regardless to what extent such action may adversely affect interstate commerce"). The fact that the economic regulation here is in an area where the states may have some special powers under the 21st Amendment makes no difference. See *infra* Part III.

³² 64 N.Y.2d at 488, 479 N.E.2d at 768, 490 N.Y.S.2d at 132. The New York Court of Appeals sought to distinguish *United States*

ensuring that New Yorkers obtain the *lowest* prices in the nation. Thus, the effect of the statute is not merely to obtain a benefit for New Yorkers but to do so at the expense of residents of other states, whom New York directly deprives of their ability to bargain for lower prices.³³

Brewers Association v. Healy, 692 F.2d 275 (2d Cir. 1982) (Connecticut beer price affirmation statute unconstitutional), *aff'd mem.*, 464 U.S. 909 (1983), on the ground that the Connecticut price parity statute in that case was "designed to discriminate." 64 N.Y.2d at 488, 479 N.E.2d at 768, 490 N.Y.S.2d at 132. The Second Circuit, however, had properly declared that it "need not reach" contentions of discriminatory purpose "in order to find the beer price affirmation provisions on their face an impermissible burden on commerce, for it is evident that the Connecticut statute seeks to regulate prices not just in Connecticut but in its surrounding states as well." 692 F.2d at 282; *see Shafer v. Farmers Grain Co.*, 268 U.S. 189, 199 (1925) ("a state statute which by its necessary operation directly interferes with or burdens [interstate] commerce is a prohibited regulation and invalid, regardless of the purpose with which it was enacted"); *cf. City of Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978) ("the evil of protectionism can reside in legislative means as well as legislative ends").

³³ Although New York did not raise the question below, we have considered whether New York is also the subject of "discrimination" because several states have themselves gone into the liquor business and are purchasing liquor under contracts with clauses demanding the lowest price in the nation. *See supra* note 18. Such "most-favored-nation" contract clauses raise serious questions under the Sherman Act. *Cf. Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 623-24, 637 (1975) (discussing anticompetitive effect of a most-favored-nation clause and remanding evaluation of that clause under Sherman Act to lower court); *United States v. General Electric Co.*, 42 Fed. Reg. 17004, 17007 (E.D. Pa. 1977) (memorandum of Antitrust Division, U.S. Department of Justice, supporting consensual modification of Sherman Act consent decree to forbid most-favored-nation clauses on the ground that such clauses are anticompetitive). The anticompetitive consequences of the state contract clauses are aggravated by the fact that the state does not simply act as a proprietor but also requires that all sellers sell only to the state. These clauses raise serious issues of their own that require consideration of both

There are two reasons why the goal of obtaining the lowest prices in the nation is illegitimate. First, it is protectionist because it creates an economic advantage for New York citizens at the expense of citizens of other states. The New York Legislature has no more power here to deprive Vermont's (and 49 other jurisdictions') consumers of the ability to bargain for lower commodity prices than it did in *Seelig* to deprive Vermont's farmers of the ability to compete by offering lower commodity prices.³⁴ As the decisions of this Court make clear, consumer protectionism, no less than producer protectionism, violates the Commerce Clause.

For example, when Rhode Island attempted to regulate rates charged by a Rhode Island utility to a Massachusetts corporation on the ground that an unreasonably low interstate rate necessarily increased the rates

the Sherman Act question and the effect of the state's proprietary role on its authority to export prices under the Commerce Clause and the Twenty-first Amendment. Those issues are not raised in the present case, the record contains no factual data relating to them, and the Court need not decide those issues here, but may deal with them when they are raised on an appropriate record in a proper case. In any event, should New York believe that these clauses interfere with its internal policies with respect to liquor, it must pursue its remedies in the courts. *See Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 379-80 (1976).

³⁴ To be sure, the distillers in this case have the theoretical freedom to lower their prices in other states to whatever level they want, so long as they wait until the next New York posting period, post that lower price in New York, and charge it there and in every other affirmation state. But the requirement that any price reduction be national deters any price reduction a distiller might wish to undertake in another state. And the way in which New York deters the out-of-state price cut is itself significant: it demands a monetary benefit for New Yorkers in exchange for allowing a distiller the "privilege" of lowering its prices on sales outside New York to non-New York wholesalers. New York's attempt to burden interstate transactions by conditioning them on actions that benefit New York economic interests is the very essence of the "protectionism" that the Commerce Clause condemns. *See supra* p. 16 & note 37.

charged intrastate to Rhode Island consumers, this Court found a Commerce Clause violation.³⁵ More recently, this Court unanimously rejected New Hampshire's attempt to save its citizens \$25 million in power costs per year by burdening interstate commerce.³⁶ A purpose "to gain an economic advantage for New Hampshire citizens at the expense of New England Power's customers in neighboring states," observed the Court, is "simple economic protectionism."³⁷

Second, even if the statute's purpose and effect to "prevent[] continued discrimination" were as laudable

³⁵ *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83, 90 (1927) ("[I]f Rhode Island could place a direct burden upon the interstate business of the Narragansett Company because this would result in indirect benefit to the customers of the Narragansett Company in Rhode Island, Massachusetts could, by parity of reasoning, reduce the rates on such interstate business in order to benefit the customers of the Attleboro Company in that State, who would have, in the aggregate, an interest in the interstate rate correlative to that of the customers of the Narragansett Company in Rhode Island.").

³⁶ *New England Power Co. v. New Hampshire*, 455 U.S. 331, 336 (1982).

³⁷ *Id.* at 339 (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)). The Court's definition of impermissible "protectionism" in *New England Power Co.* was hardly novel. Four decades earlier, Justice Stone observed that "[s]tate regulations affecting interstate commerce, whose purpose or effect is to gain for those within the state an advantage at the expense of those without, . . . have been thought to impinge upon the constitutional prohibition even though Congress has not acted." *South Carolina State Highway Department v. Barnwell Bros.*, 303 U.S. 177, 184 n.2 (1938). But see *Joseph E. Seagram & Sons v. Gazzara*, 610 F. Supp. 673, 680 (S.D.N.Y.) (erroneously holding that New York's affirmation statute is not "protectionist" because a definition of "protectionism" as "any statute that 'solely seeks to benefit residents at the expense of residents in other states'" would be "plainly inappropriate"), appeal docketed, No. 85-7547 (2d Cir. July 1, 1985).

as the New York Court of Appeals seemed to believe, achievement of such a purpose would still be beyond the power of New York's legislature. A state's goal is not legitimate under the Commerce Clause merely because it is rationally related to that state's perception of the public good, for no state has freedom (or special competence) to decide what is good for another state or for interstate commerce.³⁸ The power to regulate prices within a given state for the public good belongs to that state. The power to regulate economically across state lines for the public good belongs to Congress, and Congress alone.

Judge Learned Hand, writing for the lower court in *Seelig*, made this distinction clear. New York's depression-era milk price maintenance scheme, designed to aid New York farmers, had been upheld as constitutional,³⁹ and, Judge Hand observed,

it is easy to see how the whole scheme might be imperilled, and conceivably wrecked, unless foreign milk, bought at cut prices, could be kept out of competition with the domestic supply. . . . [T]here is much to be said for the propriety of the extraterritorial feature, and Congress might well be induced to sanction it as it stands. But that sanction is, we think, essential to its validity. . . . Although the section in question may be a reasonable incident to the state's internal economic polity, nevertheless it seeks to protect a local industry by excluding foreign

³⁸ See, e.g., *Louisiana Dairy Stabilization Board v. Dairy Fresh Corp.*, 454 U.S. 884 (1981), *aff'g mem.* 631 F.2d 67, 69 (5th Cir. 1980) (rejecting "anti-trust" rationale for extraterritorial milk marketing regulation on the ground that "Louisiana . . . has by virtue of the Commerce Clause no power to project its economic regulation—at least insofar as the purpose is to protect local economic interests—to production, processing, and sale of dairy products at places without the state").

³⁹ *Nebbia v. New York*, 291 U.S. 502 (1934).

competing goods, and that is exactly the kind of activity against which the commerce clauses are primarily directed. Their occasion was the mutual jealousies and aggressions of the states, taking form in customs barriers and other economic retaliation. . . . The Constitution denies to a state that kind of economic sanction, and puts it in the hands of the public authority charged with the national welfare.⁴⁰

Just such jealousies and retaliation as Judge Hand (and Justice Cardozo)⁴¹ warned against have become manifest. The New York affirmation statute, as this Court observed in *Seagram*, was prompted by a determination that New York liquor consumers were paying higher prices than consumers in other states.⁴² Although those higher prices had been "fostered by the mandatory minimum price maintenance provision of [New York] law, . . . [t]he legislature did not stop . . . with repeal of the mandatory resale price maintenance provision."⁴³ In the unilateral determination of the New York Legislature, where out-of-state consumer interests were of course wholly unrepresented,⁴⁴ New York was entitled to the lowest prices in the nation.

⁴⁰ *Seelig v. Baldwin*, 7 F. Supp. 776, 780-81 (S.D.N.Y.) (three-judge court) (opinion on interlocutory injunction), *aff'd per curiam sub nom. Baldwin v. G.A.F. Seelig, Inc.*, 293 U.S. 522 (1934).

⁴¹ *Seelig*, 294 U.S. at 522.

⁴² 384 U.S. at 39; *see* 64 N.Y.2d at 487, 479 N.E.2d at 768, 490 N.Y.S.2d at 132.

⁴³ 384 U.S. at 39.

⁴⁴ *See South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, —, 104 S. Ct. 2237, 2243 (1984); *South Carolina State Highway Department v. Barnwell Brothers*, 303 U.S. 177, 184 n.2 (1938); *see also Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767 n.2 (1945); *cf. United Building & Construction Trades Council v. Mayor of Camden*, 465 U.S. 208, 217 n.9 (1984) (basing analysis under Privileges and Immunities Clause on lack of representation within the decisionmaking political body).

Numerous other states, jealous of the ability of New York wholesalers to demand the lowest price in the nation, have reacted since *Seagram* by passing statutes with the same "no higher than the lowest price" requirement. Thus, it is now clear that "the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation."⁴⁵ By virtue of New York's statute and its progeny in other states, there is an "artificial rigidity [in] the economic pattern of the industry,"⁴⁶ which violates fundamental Commerce Clause principles: "[O]ur economic unit is the Nation, which *alone* has the gamut of powers necessary to control of the economy[;] . . . the states are not separable economic units."⁴⁷

In sum, *Seelig* establishes that a demand of "price parity" is impermissible under the Commerce Clause. *Attleboro* and *New England Power* establish that seeking economic benefits for in-state consumers, no less than seeking economic benefits for in-state producers, is illegitimate as well.⁴⁸ The cases together establish that New York has no power under the Commerce Clause to demand price parity in order to benefit its in-state consumers. As we will now show, the Twenty-first Amendment does not save New York's affirmation statute and, indeed, reinforces the conclusion that it is unconstitutional.

⁴⁵ *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935).

⁴⁶ *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 537 (1949); *Toomer v. Witsell*, 334 U.S. 385, 403-04 (1948).

⁴⁷ *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 537-38 (1949) (emphasis added).

⁴⁸ *Accord Pennsylvania v. West Virginia*, 262 U.S. 553, 597-98 (1923) (West Virginia's statute governing sale of West Virginia natural gas "is in effect an attempt to regulate the interstate business to the advantage of the local consumers. But this she may not do.").

III. THE TWENTY-FIRST AMENDMENT TO THE CONSTITUTION DOES NOT VALIDATE NEW YORK'S AFFIRMATION STATUTE

The Twenty-first Amendment to the Constitution, adopted in 1933, repealed Prohibition.⁴⁹ Section 2 of that Amendment, however, reserved to the states certain powers to regulate liquor; thus, it provides that the "[t]ransportation or importation into any state . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. Amend. XXI, § 2.

This Court has held that Section 2 confers power on the states to regulate the importation and sale of liquor within their own borders.⁵⁰ However, this power is not unlimited. As the Court has repeatedly held, the Twenty-first Amendment did not operate "to 'repeal' the Commerce Clause" or other provisions of the Constitution or federal law "wherever regulation of intoxicating liquors is concerned."⁵¹ Rather, when a state liquor regulation conflicts with a constitutional provision or federal statute, the Court has applied a balancing analysis, which determines whether the state asserts an interest cognizable under the Twenty-first Amendment and, if so, whether

⁴⁹ Section 1 provides, "The eighteenth article of amendment to the Constitution of the United States is hereby repealed." U.S. Const. Amend. XXI, § 1.

⁵⁰ See, e.g., *Capital Cities Cable v. Crisp*, 104 S. Ct. 2697, 2707 (1984); *California Retail Liquor Dealers Association v. Midcal Aluminum*, 445 U.S. 97 (1980); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132 (1939).

⁵¹ *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964); accord, e.g., *Bacchus Imports, Ltd. v. Dias*, 104 S. Ct. 3049, 3058 (1984); *Capital Cities Cable v. Crisp*, 104 S. Ct. 2694, 2707 (1984).

the regulation is sufficiently within the core purpose of the Amendment to outweigh the federal interest involved.⁵²

The question presented by the New York statute is not whether New York may control liquor prices within its borders if its interest in doing so is related to the purposes of the Twenty-first Amendment. For present purposes, we assume that it may. The question here is whether New York may seek shelter under the Amendment for an affirmation statute that controls liquor prices elsewhere and thus interferes directly with interstate commerce.

As we show below, the Twenty-first Amendment does not authorize New York or any other state to regulate liquor outside its own borders. Moreover, the New York statute is antithetical to the very purposes of the Twenty-first Amendment since its extraterritorial effect deprives other states of their right—guaranteed by Section 2 of the Amendment—to regulate liquor within their own borders. In this case, there is no Twenty-first Amendment interest of New York to "balance" against the important federal interest in the free flow of commerce.

A. The Twenty-first Amendment Does Not Empower New York to Regulate the Price of Liquor Outside Its Own Borders

This Court has held in a long line of cases that Section 2 does not empower states to regulate the sale of

⁵² See *Bacchus Imports, Ltd. v. Dias*, 104 S. Ct. 3049 (1984); *Capital Cities Cable v. Crisp*, 104 S. Ct. 2694 (1984). These decisions reiterate that only state liquor laws that regulate or restrict the importation, sale, use, or distribution of liquor *within* the state's borders implicate the core power of § 2. In addition, they suggest that even such statutes will be carefully scrutinized to determine whether the state interests they serve are related to the promotion of temperance or some other valid Twenty-first Amendment purpose. Only those liquor laws are entitled to additional support from the Twenty-first Amendment when they conflict with federal law or policy.

liquor outside their borders.⁵³ In *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938), decided shortly after the Twenty-first Amendment was adopted, the Court struck down a California statute that imposed certain regulations on the sale and use of liquor within Yosemite National Park, territory over which California had ceded jurisdiction to the United States.⁵⁴ In so doing, the Court rejected the argument that the Twenty-first Amendment empowered California to regulate liquor in the Park, since "though the Amendment may have increased 'the state's power to deal with the problem [of liquor importation], it did not increase its jurisdiction.'" ⁵⁵ The Court emphasized that the Twenty-first Amendment conferred no power on the states to regulate liquor outside their borders:

As territorial jurisdiction over the Park was in the United States, the State could not legislate for the area merely on account of the XXI Amendment. There was no transportation into California "for delivery or use therein." The delivery and use is in the Park, and under a distinct sovereignty. Where exclusive jurisdiction is in the United States, without power in the State to regulate alcoholic beverages, the XXI Amendment is not applicable.⁵⁶

⁵³ See, e.g., *United States v. State Tax Commission*, 412 U.S. 363 (1973); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964); *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964); *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938); *United States Brewers Association v. Healy*, 692 F.2d 275 (2d Cir. 1982), *aff'd mem.*, 464 U.S. 909 (1983).

⁵⁴ California had reserved the right to tax persons and corporations within the Park, but had not reserved—and thus had no jurisdiction over—the sale or use of liquor within the park. 304 U.S. at 524-26.

⁵⁵ *Id.* at 538.

⁵⁶ *Id.*

And in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), the Court held that New York was not empowered by the Twenty-first Amendment to regulate the sale of liquor destined exclusively for export from the state, and noted that the focus and operational sphere of state power under the Twenty-first Amendment was limited to *intrastate* commerce.⁵⁷

Again, the Court in *United States v. State Tax Commission*, 412 U.S. 363 (1973), struck down a state tax commission regulation concerning the sale of liquor to military bases located within Mississippi over which the United States exercised exclusive jurisdiction, on the grounds that a state had no Twenty-first Amendment power to exercise jurisdiction over another sovereign—whether it be another state, the United States, or a foreign land. The Court said:

[A]ny legitimate state interest in regulating the importation into Mississippi of liquor purchased on the bases by individuals cannot effect an extension of the State's territorial jurisdiction so as to permit it to regulate . . . the importation of liquor into the federal enclaves which "are to Mississippi as the territory of one of her sister states or a foreign land."⁵⁸

A contrary conclusion, the Court reasoned, would "give an unintended scope to a provision designed only to aug-

⁵⁷ The Court noted that New York could have adopted reasonable regulations to control the passage of liquor through its territory in the interest of preventing its unlawful diversion into the internal commerce of the state. However, the statute in *Hostetter* had no such purpose or effect. 377 U.S. at 333; accord *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964) (holding that Kentucky had no power to impose a tax on liquor imported from abroad under the Twenty-first Amendment, but only to regulate that liquor within its borders, after it had been imported).

⁵⁸ 412 U.S. at 378.

ment the powers of the States to regulate the importation of liquor destined for use, distribution, or consumption in its own territory, not to 'increase its jurisdiction.'"⁵⁹

More recently, the Second Circuit in *United States Brewers Association v. Healy*, 692 F.2d 275 (2d Cir. 1982), *aff'd mem.*, 464 U.S. 909 (1983), struck down a Connecticut statute almost identical to the New York statute involved here, holding that the effect of the regulation was to set minimum prices in other states in violation of the Commerce Clause.⁶⁰ The court specifically rejected the argument that the statute was permissible under the Twenty-first Amendment, stating that "[w]e are aware of no authority to the effect that the Twenty-first Amendment modifies the traditional Commerce Clause principles that bar a state from regulating the transport, sale, or use of products outside of its own territory."⁶¹

As demonstrated above, the New York affirmation statute at issue here carries with it effects that clearly transcend the borders of New York. Its insistence on price parity with other states effectively controls prices throughout the country with respect to liquor transactions that have nothing to do with New York. The cases discussed above compel the conclusion that New York is not empowered by the Twenty-first Amendment to engage in a form of liquor regulation that controls prices outside its own borders.

B. The New York Affirmation Statute Is Fundamentally Inconsistent with the Twenty-first Amendment

A principal purpose of the Twenty-first Amendment was to prevent wet states from exporting liquor to dry

⁵⁹ *Id.*

⁶⁰ See *supra* p. 7.

⁶¹ 692 F.2d at 281.

states, thereby interfering with their control over liquor consumption within their borders. New York has no more power to export its prices, thereby interfering with another state's control over liquor prices within its borders, than to export its liquor to a state that does not want it.

Section 2 of the Twenty-first Amendment incorporated into the Constitution the provisions of two pre-Prohibition statutes, the Wilson Act of 1890⁶² and the Webb-Kenyon Act of 1913.⁶³ The statutes were enacted primarily to enable "dry" states to prohibit or otherwise reasonably regulate the importation, sale, or use of liquor within their borders and to protect all states from interference by other states in their internal liquor policies.

Thus, Senator Hoar pointed out that unless the Wilson Act were passed, "wet" states would be able to ship

⁶² The Wilson Act provides in part:

All fermented, distilled, or other intoxicating liquors or liquids transported into any State . . . or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State . . . be subject to the operation and effect of the laws of such State . . . enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State . . . and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

27 U.S.C. § 121 (1982).

⁶³ The Webb-Kenyon Act provides in part:

The shipment or transportation . . . of any . . . intoxicating liquor of any kind, from one State . . . into any other State . . . or from any foreign country into any State . . . which said . . . intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State . . . is prohibited.

27 U.S.C. § 122 (1982).

liquor into the "dry" states at will and thereby determine the liquor policies of those states:

any person . . . in another State or in a foreign country, may through his own agencies send intoxicating liquor into any of the States of this Union, and having selected the kind of package in which he chooses to put it he may, by those agencies, deliver it for use to any citizen of the State or dweller therein; and that it shall not be competent for any State authority to prohibit that delivery."⁶⁴

Similarly, in the debate surrounding passage of the Webb-Kenyon Act in 1913,⁶⁵ supporters emphasized that its purpose was to provide *each* state with the power to regulate liquor within its own borders and thereby to prevent the precise problem of citizens of one state acting in a way that interfered with the right of citizens in another state to regulate the liquor trade freely within their own borders. Senator Kenyon, sponsor of the bill, stated:

[The Webb-Kenyon Act's] purpose, and its only purpose, is to remove the impediment existing as to the States in the exercise of their police powers regarding the traffic or control of intoxicating liquors within their borders. . . . Where a State has determined that intoxicating liquors shall not be manufactured or sold within its borders, is it not manifest that the citizens of other States should not be granted

⁶⁴ 21 Cong. Rec. 4961 (1890).

⁶⁵ Following passage of the Wilson Act, the Court interpreted the "upon arrival" provision of that Act to mean that a state's regulatory powers could not take effect until the liquor was delivered to the ultimate consignee. *See, e.g., Louisville & Nashville Railroad v. F.W. Cook Brewing Co.*, 223 U.S. 70 (1912). As a result, states were unable to prohibit or regulate the importation of liquor into their borders. The Webb-Kenyon Act was passed in 1913 to restore that power to the states. *See Clark Distilling Co. v. Western Maryland Railway*, 242 U.S. 311 (1917).

greater privileges in that State than its own citizenship enjoy?"⁶⁶

And, again:

While it is true that one State cannot by its laws have extraterritorial effect upon contracts made and executed in another State, yet is it not equally true that one State should not have extraterritorial power to break down and destroy the laws of another State under the pretense that they were protected by the interstate-commerce clause of the Constitution?"⁶⁷

Representative Henry emphasized further that the Webb-Kenyon Act was intended to confer on each state the "right of local self-government" with respect to liquor. He said:

Let me say to gentlemen on the other side of the aisle, many of you coming from Northern States, that years ago you appealed to Congress to allow you to refuse to surrender fugitive slaves and permit you to exercise the functions and rights of sovereign States. Today we appeal to you to maintain the integrity of State laws, State governments, and the right of local self-government, "to let the people of every State control the liquor traffic as they see proper."⁶⁸

In the course of the debates on the repeal of Prohibition, the Webb-Kenyon Act was incorporated into the Twenty-first Amendment.⁶⁹ The debate surrounding the

⁶⁶ 49 Cong. Rec. 707 (1912).

⁶⁷ 49 Cong. Rec. 760-61 (1912).

⁶⁸ 49 Cong. Rec. 2787 (1912) (emphasis in original).

⁶⁹ The Wilson and Webb-Kenyon Acts had been upheld by divided Courts. *See Clark Distilling Co. v. Western Maryland Railway*, 242 U.S. 311 (1917); *In re Rahrer*, 140 U.S. 545 (1891). As a result, supporters of the dry states urged that the Webb-Kenyon Act be incorporated into the Twenty-first Amendment, fearing that the Act might otherwise be overruled in the future by the Supreme

adoption of Section 2 makes clear that that Section, like the earlier Acts, was intended to grant to each state the power to prohibit or regulate liquor within its own borders and to prevent other states from interfering in the liquor policies of individual states. Thus, Senator Blaine stated that the Twenty-first Amendment would prevent "the dry States from interfering with the so-called wet States in connection with this question of intoxicating liquors" and would "grant to the dry States full measure of protection, and thus prohibit the wet States from interfering in their internal affairs respecting the control of intoxicating liquors."⁷⁰ Senator Borah also emphasized that Section 2 would guarantee to the states "the right to control the liquor interests within their respective borders" and the right of "local self-government, State rights, in the matter of the control of intoxicating liquors."⁷¹

The history of the Twenty-first Amendment thus makes clear that Section 2 was intended to empower each state to prohibit entirely or to regulate the importation, sale, use, or distribution of liquor within its borders. Moreover, it was specifically aimed at preventing one state from foisting its liquor policies and preferences on another.⁷² New York's affirmation statute, which effectively sets the price of liquor outside its borders, is clearly

Court or modified or even repealed by Congress, leaving the dry states unprotected. See 76 Cong. Rec. 4141 (1933) (remarks of Sen. Blaine); *id.* at 4228 (remarks of Sen. Bingham).

⁷⁰ 76 Cong. Rec. 4141 (1933).

⁷¹ *Id.* at 4170.

⁷² This Court's decisions discussed above in Part III, A, further support our contention, based on the history of the Twenty-first Amendment, that § 2 does not empower one state to impose its liquor policies and preferences on another sovereign. See *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938); *United States v. State Tax Commission*, 412 U.S. 363 (1973).

contrary to the purposes of Section 2 since it imposes New York's liquor policies on other states and thereby prevents those states from adopting their own policies with respect to the sale and use of liquor within their borders.⁷³ The Twenty-first Amendment not only does not validate the New York statute but in fact underscores its invalidity.

CONCLUSION

For the reasons stated herein, the judgment of the New York Court of Appeals should be reversed.

Respectfully submitted,

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⁷³ For one state's recent description of how the affirmation statutes interfere with the ability of other states to set their own liquor-pricing policy, see Motion for Leave to File Complaint, With Complaint and Brief in Support of Motion, *Pennsylvania v. Alabama*, No. 101, Original (U.S. filed Feb. 28, 1985), *motion denied*, 105 S. Ct. 3473 (1985).

AMICUS CURIAE

BRIEF

No. 84-2030

Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

BROWN-FORMAN DISTILLERS CORPORATION,
Appellant,

-against-

STATE OF NEW YORK LIQUOR AUTHORITY,
Appellee.

On Appeal from the Court of Appeals of New York

**BRIEF OF THE UNITED STATES BREWERS
ASSOCIATION, INC., ANHEUSER-BUSCH, INC., AND
MILLER BREWING COMPANY AS AMICI CURIAE
IN SUPPORT OF APPELLANT**

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**BRIEF OF THE UNITED STATES BREWERS
ASSOCIATION, INC., ANHEUSER-BUSCH, INC., AND
MILLER BREWING COMPANY AS AMICI CURIAE
IN SUPPORT OF APPELLANT**

This brief is filed under Rule 36.2 of the Rules of this Court with the consent of all the parties.

Interest of Amici Curiae

The United States Brewers Association, Inc. ("USBA") is a non-profit corporation organized and existing under the laws of the State of New York, with its principal place of business in Washington, D.C. The membership of the USBA consists

of 39 companies that brew beer in the United States; 23 companies that import and sell in the United States beer brewed outside the United States are affiliated members.

Anheuser-Busch, Inc. ("Anheuser-Busch"), a member of the USBA, is a domestic brewer and a corporation organized and existing under the laws of the State of Missouri, with its principal place of business in Missouri. Miller Brewing Company ("Miller") is also a domestic brewer. It is a corporation organized under the laws of the State of Wisconsin, with its principal place of business in Wisconsin. Both Anheuser-Busch and Miller distribute and market their products throughout the United States.

The Amici were parties to *United States Brewers Association, Inc. v. Healy*, 692 F.2d 275 (2d Cir. 1982), *aff'd mem.*, 464 U.S. 909 (1983) ("Healy"), which invalidated a Connecticut beer price affirmation statute almost identical to that of New York's at bar. They currently are challenging a revised Connecticut alcoholic beverage price affirmation statute in the United States District Court for the District of Connecticut on a legal basis similar to the challenge involved in this action. *United States Brewers Association, Inc. v. Healy*, No.H 84-816 PCD (D. Conn.).¹

The USBA and its membership, including Anheuser-Busch, and Miller therefore have a substantial interest in this appeal. A determination of the constitutional validity of New York's liquor price affirmation provisions will have a direct bearing on the validity of other state liquor, wine and beer price affirmation statutes. As will be shown herein, New York's and other states' price affirmation statutes have created in effect an artificially state-imposed nationwide pricing structure for alcoholic beverages. Thus, resolution of the fundamental Commerce Clause issue in this case could directly affect the pricing, distribution and marketing of the Amici's brand products.

¹ This Connecticut affirmation statute was enacted subsequent to this Court's summary affirmance in *Healy*. Anheuser-Busch, Miller, and several other brewers including members of the USBA, are also parties to litigation involving a former price affirmation law of New Mexico.

SUMMARY OF ARGUMENT

This appeal presents straightforward questions of constitutional law: Whether N.Y. Alco. Bev. Cont. ("ABC") Law § 101-b(3)(d) imposes an impermissible burden on interstate commerce and, if so, whether the Twenty-first Amendment rescues the statute from invalidation. The Amici respectfully submit that the answer to the first question is clearly yes and to the second clearly no.

In the recent decision of *Bacchus Imports, Ltd. v. Dias*, 104 S. Ct. 3049 (1984), this Court set forth the standard to be employed in analyzing a challenge under the Commerce Clause to a state's regulation of alcoholic beverages. First, a court must determine whether the statute substantially inhibits interstate commerce. If such an impact is identified, the court must balance that impact against those particular state interests which are (a) advanced by the state in support of the legislation and (b) constitute legitimate concerns protected by the Twenty-first Amendment. As will be demonstrated, application of this test to the New York statute at issue in this case mandates a declaration of unconstitutionality.

In the nineteen years since this Court rejected a facial attack on the first liquor price affirmation statute in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966), state price affirmation statutes have proliferated. In fact, thirty-eight states, including New York, presently have some form of statutory or regulatory price affirmation in effect with respect to some or all alcoholic beverages offered for sale within those states. These statutes, which coerce all manufacturers of alcoholic beverages to offer their products for sale at a price no greater than the current lowest price offered in any other state in the nation, have created a national uniform artificial price structure without regard to the actual market conditions prevailing in any state. This extraterritorial effect imposes a substantial burden on interstate commerce violative of the Constitution's Commerce Clause. Thus, in contrast to the situation presented in *Seagram*, this appeal presents a concrete

basis for a consideration of the constitutionality of affirmation statutes on the basis of two decades of experience.

Moreover, recent decisions of this Court make it clear that the Twenty-first Amendment does not insulate these statutes from Commerce Clause challenge. Although that Amendment might substantially shelter state statutes that regulate the importation and distribution of alcoholic beverages in order to promote temperance, statutes such as affirmation provisions which by their nature are focused upon extraterritorial activities are subject to a searching balancing test. Here, the federal interest in free competition in interstate commerce articulated in the Commerce Clause far outweighs any purported state interest related to the Twenty-first Amendment or any other interest advanced by New York.

ARGUMENT

I. NEW YORK'S PRICE AFFIRMATION STATUTE SUBSTANTIALLY BURDENS INTERSTATE COMMERCE

The New York Court of Appeals erred in concluding that the New York price affirmation provisions only incidentally affect interstate commerce. It ignored the holdings of this Court that legislation which directly and substantially restricts conduct beyond a state's border constitutes a severe burden upon interstate commerce which can be justified only—if at all—by very special circumstances.

Where the purpose or effect of state law is to regulate conduct occurring wholly outside the state, the burden on commerce is impermissible virtually *per se*. *E.g.*, *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 199 (1925) ("a state statute which by its necessary operation directly interferes with or burdens such commerce is a prohibited regulation and invalid, regardless of the purpose with which it was enacted"). *Accord Edgar v. MITE Corp.*, 457 U.S. 624 (1982) (Opinion of White, J.) (Commerce Clause prohibits application of Illinois statute that interfered with rights of non-Illinois shareholders to

sell their shares to a non-Illinois buyer in a transaction outside of Illinois); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945) (state may not regulate length of trains within its borders where the practical effect is to control train operations beyond its boundaries); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) (interstate commerce unduly burdened by state law forbidding in-state resale of milk purchased from out-of-state farmers at prices below the minimum prices required to be paid to in-state farmers).

Similarly, a state may not regulate liquor pricing beyond its borders. *E.g.*, *United States Brewers Association, Inc. v. Healy*, 692 F.2d 275 (2d Cir. 1982), *aff'd mem.*, 464 U.S. 909, (1983) (Connecticut beer price affirmation statute held to place an unconstitutional burden on interstate commerce). *See Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1966) (Commerce Clause prohibits states from preventing Federal Bureau of Customs from regulating liquor delivery to consumers in foreign countries). As is demonstrated below, in light of the experience of the past twenty years since New York first adopted affirmation, New York's price affirmation statute clearly regulates extraterritorial conduct and, therefore, is violative of the Commerce Clause.

A. New York's Price Affirmation Statute Constitutes Impermissible Extraterritorial Regulation

A very similar New York price fixing regulation—this time for milk—was invalidated by this Court in *Baldwin v. G.A.F. Seelig, Inc.*, *supra*. In *Baldwin*, New York attempted to require milk processors in New York to enter an agreement with the state promising that if they purchased milk from producers outside New York, they would pay a price no lower than the price charged by New York producers for similar milk. The Court found that the regulatory scheme violated the Commerce Clause: "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there." 294 U.S. at 521.

In the same way the legislation in *Baldwin* sought to eliminate any potential price advantage Vermont producers might have by tying the price at which Vermont milk was purchased to the New York price, the New York price affirmation provisions seek to eliminate any potential price advantage non-New York wholesalers and consumers might have by tying the price at which liquor is sold in other states to the New York price. Indeed, the New York liquor price affirmation statute constitutes an even more egregious attempt to regulate commerce beyond the state's borders than the New York milk statute invalidated in *Baldwin*. In that case the transactions burdened by New York were sales by Vermont producers to New York processors, and thus had at least some nexus with New York. New York, through its liquor price affirmation statute, in contrast, has chosen to restrict transactions occurring completely outside its borders between out-of-state liquor manufacturers and out-of-state wholesalers.

B. The Interaction of the New York Price Affirmation Statute With Affirmation Statutes of Other States Obstructs Interstate Commerce

New York's liquor price affirmation legislation, moreover, is far more invidious than the New York legislation condemned in *Baldwin* because of its interaction with other state alcoholic beverage affirmation statutes. Presently, thirty-eight states, including New York, have liquor affirmation statutes or regulations.² These affirmation statutes require alcoholic bev-

2 Of these thirty-eight states, eighteen (Alabama, Idaho, Iowa, Maine, Michigan, Mississippi, Montana, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming) are "control states"—states which have a monopoly to purchase all liquor distributed for consumption and use within their respective borders and which require that distillers maintain through affirmation a uniform price for each of their brands throughout the nation.

The remaining twenty affirmation states regulate through affirmation the prices charged by distillers to private wholesalers. These include: Arizona (Ariz. Rev. Stat. Ann. § 4-253(A) (Supp. 1984)); California (Cal. Ann. Bus. & Prof. Code § 4-23673 (West Supp. 1984)); Connecticut (Conn. Gen. Stat. § 30-63b(a) (1985)); Delaware (Del. Code Ann. tit. 4,

erage suppliers to affirm to the applicable state authorities that the prices charged by that supplier within the state are, were or will be no greater than the lowest price offered anywhere in the United States for any particular item.³ In general the interaction of these statutes has the onerous effect of converting the minimum wholesale price offered anywhere in the United States into the maximum wholesale price throughout all thirty-eight affirmation states. In other words, a distiller cannot lower a price in any state unless it is prepared to sell at that price in the affirmation states.

Suppliers and purchasers of spirits are therefore confronted with an interrelated system of state regulations, each of which has the extraterritorial effect of creating a single price and preventing price competition in particular markets because of the prohibitions against lowering prices in any market without doing so in the thirty-eight affirmation states. There is no doubt that these regulatory schemes restrict and, indeed, virtually

§ 508(a) (1974)); Florida (Fla. Stat. Ann. § 565.15(1) (West Supp. 1984)); Georgia (Ga. Dep't. Revenue, Alcohol and Tobacco Tax Unit, Ch. 5670-2-3-.47 (1982)); Hawaii (Hawaii Rev. Stat. §§ 281-122, 281-123 (Supp. 1983)); Kansas (Kan. Stat. Ann. §§ 41-1101(a), 41-112(a) (Supp. 1983)); Louisiana (La. Rev. Stat. Ann. § 26: 370(b) (West 1975)); Maryland (Md. Ann. Code Art. 2B, § 109 (C-1) (1981)); Massachusetts (Mass. Gen. Laws Ann. Ch. 138, §§ 25C(a), 25D(a-b) (West Supp. 1985)); Minnesota (Minn. Stat. § 340.114 (subd. 3) (Supp. 1984)); Nebraska (Neb. Rev. Stat. §§ 53-170.02, 53-170.03 (1978)); New Jersey (N.J. Admin. Code tit. 13, § 2-24.5(a)(3) (1980)); New Mexico (N.M. Stat. Ann. §§ 60-8A-12(A), 60-8A-15 (1981)); New York (N.Y. Alco. Bev. Cont. Law § 101-b(3)(d) (Consol 1980)); Oklahoma (Okla. Stat. Ann. tit. 37, § 536.1 (West Supp. 1985)); Rhode Island (R.I. Gen. Laws § 3-6-14.1 (1976)); South Carolina (S.C. Code Ann. § 61-7-100 (Law Co-op 1976)); and Tennessee (Tenn. Code Ann. § 57-3-202(e) (1-3) (1980)).

3 There are three categories of price affirmation statutes. One category of statutes prohibits higher prices determined from a "retrospective" time period—prices charged cannot be any greater than the lowest price offered anywhere in the United States for a period of time preceding the current posting of liquor prices. See Ariz. Rev. Stat. Ann. § 4-253(A) (Supp. 1984). Another category prohibits higher prices from a "prospective" time period—for a time period after the posting of price schedules. A third category prohibits higher prices for a contemporaneous period—for the period during which the price schedule is in effect.

prohibit suppliers and purchasers from freely setting prices throughout the nation. They thereby constitute an impermissible regulation of interstate commerce under the Commerce Clause.

Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966), is not to the contrary. In that case the Court sustained the constitutionality of New York's predecessor price affirmation statute—the first in the nation—against claims that the New York law facially imposed an unlawful burden on interstate commerce.⁴ Nevertheless, the Court declined to generally endorse the constitutionality of such legislation. 384 U.S. at 42-43. The Court concluded that "[a]lthough it is possible that specific future applications of [the New York statute] may engender concrete problems of constitutional dimensions, it will be time enough to consider any such problems when they arise." 384 U.S. at 52. That time has arrived.

In the years since this Court's decision in *Seagram*, the experience of the distilling and wine industries establishes that the hypothetical effects of affirmation laws have become a reality. An evergrowing intertwined network of affirmation statutes has created a system that coerces all sellers to offer their products to all wholesalers at the same price in all of the aforementioned thirty-eight affirmation states.⁵ Thus, each

4 The then New York affirmation statute required that any price posted be no higher than the lowest price at which such item of liquor was sold "anywhere in the United States during the *preceding* month." *Seagram*, 384 U.S. at 40-41 (emphasis supplied). The present New York statute, N.Y. ABC Law § 101-b(3)(d), requires an affirmation that prices shall be no higher than the lowest price liquor shall be sold *prospectively* during the calendar month for which such schedule shall be in effect.

5 For instance, the current laws in California, Connecticut, Delaware, Georgia, Kansas, Louisiana, Maryland, Tennessee and South Carolina ("contemporaneous states"), see n. 2, *supra*, require that the price offered to wholesalers in each state be no higher than the lowest contemporaneous price offered to wholesalers anywhere else in the United States. However, as a result of the retrospective statutes discussed in n. 3, *supra*, there already has been established a maximum price ceiling for that contemporaneous price. Therefore, as a result of the interaction between the prices set by the prospective and retrospective statutes, the contemporaneous price becomes the maximum price for the succeeding months as well.

state's affirmation policy requires that an interstate supplier set what in effect is a single national price which often bears no relationship to market conditions in particular states. As a result of affirmation laws, the Commerce Clause concept of a national market place, unimpeded by insular state regulation, is defeated with respect to alcoholic beverages. The cumulative effect of the affirmation system is to unlawfully burden commerce because of the extraterritorial restriction of supplier pricing decisions in transactions occurring wholly beyond individual state borders. This direct extraterritorial regulation of commerce is barred by the Commerce Clause. *E.g.*, *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) (Opinion of White, J.); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935).

C. The Prospective Affirmation Provisions of the New York Statute Are Violative of this Court's Decision in *Healy*.

The present New York statute directly conflicts with a decision of this Court. In *United States Brewers Association, Inc. v. Healy, supra*, this Court summarily affirmed a ruling of the United States Court of Appeals for the Second Circuit which invalidated a Connecticut beer affirmation statute essentially identical to the amended New York affirmation provisions.⁶

Thus, interstate sales to wholesalers in each of those states must conform to the prices charged *simultaneously* to all wholesalers in all affirmation states.

More deleterious still, as discussed below, are the requirements of "prospective" affirmation states such as Florida, Hawaii, Minnesota, Nebraska, New Mexico, Rhode Island, and, of course, New York, see n. 2, *supra*, which directly "tell a [supplier] that for any given month when it sells [distilled spirits] to a wholesaler [in any other state], it may not do so at a price lower than it has previously announced it will charge to . . . wholesalers [in the affirmation state]." *Healy*, 692 F.2d at 282.

6 The Connecticut statute required an affirmation that the price to the wholesalers there "will be no higher than the lowest price at which each such item of beer is or will be sold . . . to any wholesaler in any state bordering [Connecticut], at any time during the calendar month covered by such posting." Connecticut Liquor Control Act, Conn. Gen. Stat. Ann. § 30-63(b) (West-Supp. 1984). The aforementioned Section 101-b(3)(d) of

The Second Circuit determined that the Connecticut statute, on its face, placed an impermissible burden upon interstate commerce and was not saved by the Twenty-first Amendment. It held that neither the Twenty-first Amendment nor the Commerce Clause allows a state to regulate liquor prices outside its own territory, and concluded that the price affirmation provisions impermissibly burdened interstate commerce, because they regulated prices to be charged not only in Connecticut but in the surrounding states as well:

[N]othing in the Twenty-first Amendment permits Connecticut to set the minimum prices for the sale of beer in any other state, and the well-established Commerce Clause principles prohibit the state from controlling the prices set for sales occurring wholly outside its territory.

692 F.2d at 282.

In conclusion, where the effect of state law, like New York's, is to regulate conduct occurring wholly outside the state the burden on commerce is impermissible.⁷

New York's ABC Law provides that prices to wholesalers there will be "no higher than the lowest price at which such item of liquor will be sold . . . to any wholesaler anywhere . . . at any time during the calendar month for which such schedule shall be in effect . . ."

⁷ The distinction drawn between the Connecticut and New York price affirmation statutes by the court in *Joseph E. Seagram & Sons, Inc. v. Gazzara*, 610 F. Supp. 673, (S.D.N.Y. 1985), *appeal docketed*, No. 85-7547 (2d Cir. July 1, 1985), is specious. The court upheld the New York provisions from a facial attack on the grounds that, unlike Connecticut's statute, New York allowed liquor to be sold in New York for other than the scheduled price provided that prior written permission is granted by the New York State Liquor Authority ("SLA") for "good cause shown." Therefore, the court reasoned, since the SLA may allow the lowering of prices in New York the practical effect of the statute cannot be said to prohibit a distiller from lowering liquor prices in other states.

This reasoning is unpersuasive. The decision ignores the fact that prices cannot be lowered below the price affirmed in New York for at least the duration of the time period necessary to seek and obtain the permission of the SLA. Thus, New York still exercises extraterritorial regulation of prices in other states for at least the duration of this time period. Moreover, a facially unconstitutional statute cannot be upheld on the basis that a state agency has the discretionary authority to waive its otherwise unconstitu-

II. NEW YORK'S PRICE AFFIRMATION STATUTE IS NOT PROTECTED FROM COMMERCE CLAUSE REVIEW BY THE TWENTY-FIRST AMENDMENT

As demonstrated above, under the standards previously established by this Court, New York's price affirmation statute substantially restricts interstate commerce. It is equally clear that the Twenty-first Amendment does not justify this burden.

In recent years, this Court has required that attempts by states to justify otherwise unconstitutional legislation on the basis of the Twenty-first Amendment be subjected to careful scrutiny to determine whether any interests related to that amendment are in fact implicated by the legislation. Thus, recently in *Bacchus Imports, Ltd. v. Dias*, 104 S.Ct. 3049 (1984), this Court invalidated Hawaiian liquor legislation which discriminated against out-of-state liquors in favor of a locally produced brandy (okolehao) and pineapple wine. The Court stated the issue in the case as whether "the principles underlying the Twenty-first Amendment are sufficiently implicated by the exemption for okolehao and pineapple wine to outweigh the Commerce Clause principles that would otherwise be offended." *Id.* at 3058. Thus, the question in Commerce Clause challenges involving state alcoholic beverage regulation is "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies." *Id.*, quoting *Capital Cities Cable, Inc. v. Crisp*, 104 S.Ct. 2694, 2708 (1984).⁸

tional provision. See *Public Utilities Comm'n v. United States*, 355 U.S. 534 (1958). Indeed, this Court has often considered the undeniable impact on interstate commerce of state statutes even where those statutes have not been enforced. *E.g.*, *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973); *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945).

⁸ See also *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 109 (1980) (Twenty-first Amendment grants the states substantial control over whether to permit the importation or sale of liquor; other state regulation of liquor must be balanced against federal

Bacchus held that the Twenty-first Amendment did not save the Hawaii statute from Commerce Clause invalidation because "the State [did] not seek to justify its [legislation] on the ground that it was designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment." *Id.* at 3059. The Court concluded that "because the [legislation] violates a central tenet of the Commerce Clause but is not supported by any clear concern of the Twenty-first Amendment, we reject the State's belated claim based on the Amendment." *Id.*⁹

In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Court applied a similar approach in invalidating a California wine price maintenance statute as violative of the Sherman Act. The Court emphasized that statutes restricting the pricing of alcoholic beverages must be subjected to a balancing of the federal interests against the interests sought to be advanced by the state. 445 U.S. at 110. *Midcal* held that the state's interests identified by the lower courts—the promotion of temperance and the protection of small retail establishments—were unsubstantiated by the record and in any event were far outweighed by the "familiar and substantial" federal interest in favor of competition, and held the statute invalid. *Id.* at 110-114.

The only justification which has been proffered in defense of New York's price affirmation provisions is moribund and fails totally to implicate Twenty-first Amendment concerns. The commerce power in a "pragmatic effort to harmonize state and federal powers"; *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1966) ("[b]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution [and] each must be considered in the light of the other, and in the context of the issues and interest at stake in any concrete case").

⁹ This construction of the Twenty-first Amendment appears to differ from that applied by the Court in *Seagram* where the Court implied that this Amendment provides states with broad power to regulate all matters relating to liquor, regardless of the state's purpose or the impact on interstate commerce. 384 U.S. at 42, 47. However, as *Bacchus* confirms, in recent years this Court has engaged in a much more particularized inquiry.

New York Court of Appeals asserted that the New York statute was a response to the conclusions of the Moreland Commission that "New Yorkers were being charged unreasonably high prices for liquor as compared with citizens of other States." *Brown-Forman Distillers Corporation v. State of New York Liquor Authority*, 64 N.Y.2d 479, 487; 490 N.Y.S.2d 128, 132 (1985), citing Moreland Commission Report No. 3 (1963). But the Moreland Commission's conclusions are now twenty-two years old and are irrelevant to the liquor industry as it presently exists. New York has not even claimed that any of the evils of which the Moreland Commission complained exist or potentially exist today. Indeed, it is important to note that the Moreland Commission did not recommend the adoption of the affirmation legislation. It attributed the evils which it identified to New York's mandatory price maintenance system. *See Seagram*, 384 U.S. at 39. This system was repealed at the time of enactment of the original affirmation statute. *Id.* Surely, under these circumstances, the findings of a commission over two decades ago do not authorize New York to eternally dictate liquor prices throughout the nation. Reliance upon the concerns of the 1963 Moreland Commission is simply too remote and hypothetical. Moreover, they do not in the least implicate Twenty-first Amendment concerns.

Significantly, neither the Court of Appeals nor New York has advanced any justification for its affirmation provisions which is related in any way to promoting temperance or preventing alcohol abuse. Indeed, if anything, New York's interest is in maintaining low prices which will promote consumption.¹⁰ Whether or not such a policy is sound, the Commerce Clause forbids a state from implementing it in a way which restricts commerce in other states.

¹⁰ N.Y. ABC Law § 101-b(1)'s (preamble) stated policy of "fostering and promoting temperance," which is identical to the stated purpose of California's statute invalidated in *Midcal*, does not buttress the New York price affirmation provisions. Like *Midcal*, the record here, as well as the terms of the statute, is devoid of any evidence that the New York affirmation statute advances or could plausibly advance its stated objective.

Conclusion

For the reasons stated above, the decision of the New York Court of Appeals should be reversed.

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December 2, 1985

AMICUS CURIAE

BRIEF

(6)
No. 84-2030

Supreme Court, U.S.
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DEC 2 1985

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

BROWN-FORMAN DISTILLERS CORPORATION,
Appellant,
—against—
STATE OF NEW YORK LIQUOR AUTHORITY,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

**BRIEF OF THE DISTILLERS SOMERSET
GROUP INC. AS AMICUS CURIAE**

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IN THE
Supreme Court of the United States

October Term, 1985

No. 84-2030

BROWN-FORMAN DISTILLERS CORPORATION,

Appellant,

—against—

STATE OF NEW YORK LIQUOR AUTHORITY,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

**BRIEF OF THE DISTILLERS SOMERSET
GROUP INC. AS *AMICUS CURIAE***

Interest of *Amicus Curiae*

The Distillers Somerset Group Inc. ("Somerset") is a major importer and producer of distilled spirits, and distributes its products in the State of New York and throughout the country. It is subject to the New York price affirmation law at issue in the present appeal and to price affirmation statutes in other states.

Price affirmation laws have for many years had serious constraining effects upon the marketing and pricing of

Somerset's products. These laws prevent local price adjustments which Somerset would otherwise make in order to respond to competition from local brands in certain regions, to reflect regional and seasonal variances in preference for certain national brands, and to take into account handling and other local costs that vary from state to state.

For example, Johnnie Walker Black Scotch Whisky, which is distributed by Somerset, has a far stronger competitive position in New York than in California, where Chivas Regal (the national leader) is dominant. Price affirmation laws prevent Somerset from challenging Chivas Regal's dominance in California by making adjustments in local prices, just as they prevent Somerset from making wintertime price adjustments in the sun belt and the snow belt on warm-weather products such as light rum and gin. Price affirmation laws also prevent Somerset from undertaking (a) localized experiments with the pricing of established brands and (b) the test marketing and staggered introduction of new brands, since such laws prohibit importers or producers from offering "promotional" or "introductory" prices in some parts of the country while maintaining standard pricing in affirmation states.

Because price affirmation laws thus stifle legitimate competition and stabilize prices nationwide at unreasonably high levels, Somerset has a vital interest in issues relating to the constitutionality of the New York price affirmation law and of price affirmation statutes in general. It submits this brief in support of appellant's position that the New York statute is unconstitutional.*

* All parties have consented to the filing of a brief *amicus curiae* by Somerset.

Summary of Argument

1. The present New York price affirmation statute is unconstitutional under *United States Brewers Ass'n, Inc. v. Healy*, 692 F.2d 275 (2d Cir. 1982), *aff'd*, 464 U.S. 909 (1983). The Connecticut statute at issue in *Healy*, like the New York statute at issue in the present case, required importers and producers to affirm that their alcoholic beverages would be sold, during the month after the affirmation was filed, at specified in-state prices which would be no higher than the prices charged during that month in other states. The Second Circuit held that the Connecticut statute violated the Commerce Clause because it effectively dictated the prices at which a supplier's products could be sold in other states during the month following affirmation. The court held that the statute was not saved by the Twenty-first Amendment, which reserves to each state certain powers over (i) the transportation and importation of liquor into the state and (ii) the sale of liquor within the state, because the Amendment grants the states no power to regulate the prices at which liquor may be sold in other states. This Court summarily affirmed the Second Circuit's decision.

2. *Healy*, rather than *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966), controls the present case. In *Seagram*, this Court upheld New York's predecessor price affirmation statute, which required importers and producers to affirm that the prices charged in New York would not exceed the lowest prices charged in any other state during the month *preceding* the filing of the affirmation. That statute, at least on its face, did not necessarily appear to have extraterritorial repercussions, in contrast to the statute involved in *Healy* and the amended New York statute at issue in the present case. Since the statute in *Seagram* had not yet gone into effect, the Court found

appellants' claims of extraterritorial impact to be "largely matters of conjecture" and stated that such claims should be assessed in a more concrete setting.

3. Despite the Court's later ruling in *Healy*, *Seagram* has been given a far broader reading by the lower courts and by the appellee herein than its narrow scope would warrant. Because of this, because the factual premise for the *Seagram* decision has been shown by subsequent events to be incorrect, and because this Court's views regarding the interplay between the Commerce Clause and the Twenty-first Amendment have evolved substantially in the nineteen years since *Seagram* was decided (*see Bacchus Imports, Ltd. v. Dias*, — U.S. —, 104 S. Ct. 3049, 3057-59 (1984); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)), *Seagram* should be strictly confined to its facts so that its inapplicability to the present case is made clear.

ARGUMENT

The New York Price Affirmation Law Violates the Commerce Clause Because It Controls the Prices That May Be Charged in Other States.

A. The New York Price Affirmation Law Is Unconstitutional Under *Healy*

The New York price affirmation law, N.Y. A.B.C. Law § 101-b(3), controls the minimum prices at which liquor may be sold in New York and throughout the country. It is inconsistent with the Commerce Clause and should be invalidated on the authority of *United States Brewers Ass'n, Inc. v. Healy*, 692 F.2d 275 (2d Cir. 1982), *aff'd*, 464 U.S. 909 (1983).

Section 101-b(3)(a) requires the filing, by any person who resells liquor to wholesalers, of detailed price schedules

that will remain effective during the month subsequent to the filing. Subsection (d) of the same section requires the filing of an affirmation that the price set forth on each schedule will be "no higher than the lowest price at which such item of liquor will be sold . . . to any wholesaler anywhere in any other state of the United States or in the District of Columbia . . . at any time during the calendar month for which such schedule shall be in effect".*

The effect of this law is to prevent local price adjustments which importers and producers would otherwise make in order to (a) respond to competition from local brands in certain regions, (b) reflect regional and seasonal variances in preference for certain national brands, and (c) take into account handling and other local costs that vary from state to state. For example, Johnnie Walker Black Scotch Whisky has a far stronger competitive position in New York than in California, where Chivas Regal (the national leader) is dominant. The New York price affirmation law prevents the importer of Johnnie Walker (*amicus curiae* herein) from challenging Chivas Regal's dominance in California by making adjustments in local prices, since any California adjustments would have to be matched in New York, where they would be counter-productive. The New York law also prevents the *amicus* from undertaking localized experiments with the pricing

* Section 101-b(3)(d) is thus a *prospective* price affirmation statute, *i.e.*, one under which the importer or producer affirms that the prices set forth in its schedule will be no higher than the lowest price that will be charged in other states during the *following* month. In contrast, the statute upheld in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966), was a *retrospective* statute, in which the schedule of prices for New York was keyed to the *previous* month's price charged in other states. As discussed in detail below, both types of statute affect pricing nationwide, but the effects of the two types are different in certain respects and they have accordingly been given different treatment by the Court.

of established brands, and from engaging in the test marketing and staggered introduction of new brands, since importers and producers cannot offer "promotional" or "introductory" prices in some parts of the country while maintaining standard pricing in New York.

In short, the New York law stifles legitimate competition and stabilizes prices nationwide at unreasonably high levels. And, as discussed immediately below, the statute directly controls the minimum prices at which alcoholic beverages can be sold in other states.

1. The Healy Case

In *Healy*, the United States Court of Appeals for the Second Circuit ruled that a prospective price affirmation statute, such as the one now before the Court, (a) controls the minimum prices at which alcoholic beverages may be sold in other states, (b) violates the Commerce Clause of the United States Constitution, Art. I § 8, cl. 3, and (c) is unprotected by Section 2 of the Twenty-first Amendment:

"the extraterritorial thrust of the main beer price affirmation provisions . . . is plain, for those sections prevent a brewer from selling below the Connecticut wholesaler price to any wholesaler in any neighboring state. In other words, these sections tell a brewer that for any given month when it sells beer to a wholesaler in Massachusetts, New York or Rhode Island it may not do so at a price lower than it has previously announced it will charge to Connecticut wholesalers.

. . .

" . . . the obvious effect of the Connecticut statute is to control the minimum price that may be charged by a non-Connecticut brewer to a non-Connecticut wholesaler in a sale outside of Connecticut. Nothing in the Twenty-first Amendment permits Connecticut

to set the minimum prices for the sale of beer in any other state, and well-established Commerce Clause principles prohibit the state from controlling the prices set for sales occurring wholly outside the territory." 692 F.2d at 282 (emphasis added).

We submit that *Healy*, which was summarily affirmed by this Court, constituted a proper application of principles consistently enunciated by this Court in Commerce Clause and Twenty-first Amendment cases. Under *Healy*, the current New York price affirmation statute is unconstitutional.

2. Prior Commerce Clause and Twenty-first Amendment Cases

The states may in some circumstances permissibly burden interstate commerce—at least incidentally—through their regulation of intrastate commerce. State laws regulating trade that is wholly within other states, however, are invalid under the Commerce Clause. In *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), the Court struck down a statute which required New York milk producers to agree that their purchases of milk from out-of-state farmers would be made at prices as high as the prices charged by New York farmers. As the Court stated, "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there." 294 U.S. at 521. See also *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982) (White, J.); *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 199 (1925) ("a state statute which by its necessary operation directly interferes with or burdens interstate commerce is a prohibited regulation and invalid, regardless of the purpose with which it was enacted").

Parallel principles govern the application of Section 2 of the Twenty-first Amendment, which provides that "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein

of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The Amendment gives the states greater authority, in some instances, to regulate commerce in alcoholic beverages than the Commerce Clause would permit in the case of other products. See e.g., *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 108 (1980). But it is now well settled that "the [Twenty-first] Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause." *Bacchus Imports, Ltd. v. Dias*, — U.S. —, 104 S. Ct. 3049, 3058 (1984). The Court has, for example, repeatedly rebuffed efforts by the states to regulate the sale of alcoholic beverages outside their jurisdictions. See *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964) (invalidating a state's attempt to regulate the sale of liquor destined for ultimate delivery and use in a foreign country); *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938) (invalidating a state's attempt to prevent shipment into and through its territory of liquor destined for distribution and consumption in a national park).

3. *Healy* Governs the Present Case

a. *The Applicability of Healy*

The Second Circuit in *Healy* correctly concluded that the foregoing principles mandated the invalidation of a Connecticut statute requiring brewers (a) to post the prices that they would charge for beer sold in Connecticut during the month following the posting and (b) to affirm that the prices charged in Connecticut would be no higher than the lowest prices charged in the three surrounding states. See 692 F.2d at 277. The same conclusion applies to the current New York price affirmation statute. By requiring importers and producers (a) to post the prices that they will charge in the month following the posting and (b) to affirm

that those prices will be no higher than the lowest prices to be charged in any other state, New York is establishing the minimum prices that may be charged anywhere in the nation during the month following the posting. This constitutes a regulation of business that is transacted wholly outside the borders of New York—a regulation so invasive that (i) it is prohibited by the Commerce Clause *regardless of purpose* and (ii) it cannot be sheltered from challenge by Section 2 of the Twenty-first Amendment.

An independent basis for reaching the result in *Healy* is suggested by *Bacchus Imports, Ltd. v. Dias*, — U.S. —, 104 S. Ct. 3049 (1984) and *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 112 n.14 (1980). As *Bacchus* points out, "recent Twenty-first Amendment cases have emphasized federal interests to a greater degree than had earlier cases." 104 S. Ct. at 3058. See also *Midcal*, 445 U.S. at 113 ("We have no basis for disagreeing with the view of the California courts that the asserted state interests are less substantial than the national policy in favor of competition"). Under the *Bacchus* analysis, state legislation burdening interstate commerce will be shielded by the Amendment from Commerce Clause attack only if the principles underlying the Amendment, particularly temperance, are "sufficiently implicated . . . to outweigh the Commerce Clause principles that would otherwise be offended." 104 S. Ct. at 3058. There has never been any suggestion that the New York price affirmation statute promotes temperance. Cf. *Midcal*, 445 U.S. at 112 n.14 (indicating that even resale price maintenance has not been shown to promote temperance). Thus, under *Bacchus* and *Midcal*, the New York price affirmation statute is not protected from Commerce Clause attack by the Twenty-first Amendment and is invalid in view of the burdens it imposes on interstate commerce.

In short, the New York price affirmation statute is invalid for two reasons: first, its "obvious effect," like the effect in *Healy* (692 F.2d at 282) is to control the minimum price that may be charged by non-New York producers to non-New York wholesalers in sales outside New York. A state statute cannot survive, regardless of purpose, if it has such an invasive effect on trade conducted wholly outside the state. Second, the purpose of the statute at issue is not to promote temperance or other principles underlying the Twenty-first Amendment; thus, the statute would fail under *Bacchus/Midcal* even if it merely burdened interstate commerce—which it does—and did not control trade conducted wholly outside New York.

Appellee's response to these points is two-fold: it argues, as the court below held, that *Healy* is distinguishable from the present case; and it argues that *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966), rather than *Healy*, is controlling. See Motion to Dismiss or Affirm at 2-9. Neither argument is well-founded.

b. *The Efforts to Distinguish Healy*

The court below, and appellee, have asserted that the Connecticut statute at issue in *Healy* was unconstitutional because it involved an impermissible attempt to discriminate against out-of-state businesses. According to the court, the New York statute is sustainable because it has not been tainted by any such discriminatory purpose. See *Brown-Forman Distillers Corp. v. State Liquor Authority*, 64 N.Y. 2d 479, 488, 490 N.Y.S.2d 123, 132, 479 N.E.2d 764, 769 (1985).

In thus attempting to distinguish *Healy*, the court below ignored the explicit statement in *Healy* that the Second Circuit was not basing its decision on any assertion that

the Connecticut statute had been enacted with a discriminatory purpose or had had a discriminatory effect. 692 F.2d at 281-82. The decision was based solely on the ground that the Connecticut statute would "regulate prices not just in Connecticut but in its surrounding states as well." *Ibid.**

Healy was correct in its holding that purpose was an insignificant factor in the analysis of a statute with extra-territorial effects as plain as the ones at issue in that case. A "flexible approach" to Commerce Clause cases—one taking into account the "practical effect and relative burden on interstate commerce"—may be appropriate in cases where "the effect on interstate commerce [of the statute at issue] is incidental." See *Bacchus, supra*, — U.S. —, 104 S. Ct. at 3055. However, the court below erred in seeking to apply such a flexible approach to a statute which, like the one in *Healy*, has an "extraterritorial thrust" that is "plain" and which had the "obvious effect" of controlling

* The court below erred not only in its reading of the holding in *Healy* but also in its characterization of the Connecticut statute as one enacted for purposes of discriminating against out-of-state businesses. The actual purpose of the Connecticut statute, as described in *Healy*, was to bring Connecticut's beer prices down to the same levels as the prices charged in neighboring states, with the result that Connecticut buyers would increase their purchases of beer within the state, thereby generating increased tax revenues for Connecticut. See 692 F.2d at 276. The purpose of the New York price affirmation law (upheld in *Seagram v. Hostetter*) was to eliminate "discrimination against and disadvantage of consumers" in New York by assuring that they obtained the lowest available price. See 384 U.S. at 47. The purported difference in purpose is not one of constitutional significance, particularly since neither statute appears to have been justified on the ground that it was designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment. See *Bacchus Imports, Ltd. v. Dias*, — U.S. —, 104 S. Ct. 3049, 3058-59 (1984).

the minimum prices charged in other states. See 692 F.2d at 282.*

The court below also asserted that the impact of the New York price affirmation law is slight in comparison to that of the Connecticut law involved in *Healy*, because the New York statute is "nationwide in scope, and imitated by approximately 20 other States," whereas the Connecticut statute applied only to three other states and was one of a relatively small number of beer price affirmation statutes nationwide. 64 N.Y.2d at 488, 490 N.Y.S.2d at 132, 479 N.E.2d at 768. We cannot see the logic in an assertion that a state statute which constrains prices in three other states has a greater impact upon interstate commerce than one which affects forty-nine other states and the District of Columbia. Nor does the number of states that have enacted similar statutes appear determinative. If the court meant that the effect of New York's price affirmation statute is negligible because a number of other states have already enacted similar laws, the analysis is flawed because it assumes the continued validity of the other price affirma-

* In discussing statutory purpose, appellee (but not the court below) invokes *Bacchus* in support of the assertion that states are given wide latitude under the Twenty-first Amendment unless the statute at issue is tainted by "simple economic protectionism". See Motion to Dismiss or Affirm at 2-3. In fact, *Bacchus* discussed protectionism in its Twenty-first Amendment analysis (as distinguished from its Commerce Clause analysis) only as a contrast to statutory purposes such as the promotion of temperance that are related to the principles underlying the Amendment. If a statute regulating alcoholic beverages is not "enacted to combat the perceived evils of an unrestricted traffic in liquor," it is unprotected by the Twenty-first Amendment from Commerce Clause attack, whether or not it is a protectionist statute. See — U.S. at —, 104 S. Ct. at 3058-59. Thus, in *Midcal and Capital Cities Cable, Inc., v. Crisp*, — U.S. —, 104 S. Ct. 2694 (1984) the Court invalidated non-protectionist liquor legislation in the face of arguments that the laws were protected by the Twenty-first Amendment. Indeed, in *Capital Cities Cable*, the Court ruled that a state regulation was not saved by the Twenty-first Amendment even though it was promulgated at least in some degree to promote temperance. See 104 S. Ct. at 2708-09.

tion laws, and because one cannot defend a state statute that has serious extraterritorial effects by contrasting the effects of that statute with the even greater anticompetitive effect of all similar statutes taken together. As the district court stated in *Joseph E. Seagram & Sons, Inc. v. Gazzara*, 610 F. Supp. 673, 676-77 n.4 (S.D.N.Y. 1985), *appeal pending*, No. 85-7547 (2d Cir.): "as a matter of constitutional theory, we doubt that the validity of a statute under the Commerce Clause can depend on how many states have enacted it".*

Relying on the district court's opinion in *Seagram v. Gazzara*, appellee has attempted to distinguish *Healy* on an additional ground not even suggested by the court below. Appellee bases its argument on a provision in the New York statute that gives the SLA discretion to permit liquor to be sold in New York at a price other than the scheduled price if "prior written permission of the [SLA] is granted for good cause shown and for reasons not inconsistent with the purpose" of the Alcoholic Beverage Control Law. § 101-b(3)(a). This provision, the argument runs, provides a vehicle for eliminating the extraterritorial effect condemned in *Healy*: if the making of a price reduction in another state constitutes good cause for selling below the scheduled price in New York, as appellee suggests, an importer or producer can make the desired adjustments in both states without violating the New York law, as long as it obtains the prior approval of the SLA. See *Seagram v. Gazzara*, *supra*, 610 F. Supp. at 677 (sustaining the current New York price affirmation law by distinguishing *Healy* solely on this ground). In support of its argument, appellee notes that appellant has produced no evidence

* It is noteworthy that the district court in *Gazzara* expressly rejected all of the grounds upon which the court below sought to distinguish *Healy* from the present case. See 610 F. Supp. at 676-77 n.4.

that the SLA has rejected "good cause" applications where importers or producers sought mid-month relief from complying with their New York price schedules in order to permit price reductions in other states, Motion to Dismiss or Affirm at 6-7.

Appellee's argument is flawed in at least three respects. First, this Court has never suggested that a plainly unconstitutional statute can be rendered constitutional by the mere existence of a provision giving an administrative agency discretion to grant exemptions from compliance with the statute.* Second, even if the SLA were routinely to permit non-adherence to the scheduled price lists where the importer or producer sought a mid-month adjustment in its pricing, the SLA's action could not cure the unconstitutional extraterritorial effects of the affirmation provision during the period—however long it might be—between the application for relief and the agency's approval. Third, appellee is incorrect in suggesting that it was appellant's responsibility to demonstrate that the good cause provision had not been utilized in a manner that would cure an otherwise fatal defect in the New York statute. Appellant has sustained its burden of showing that the mandatory provisions of the statute produce the same extraterritorial effects as did the Connecticut statute that was invalidated in *Healy*. Once appellant has made that showing, the burden falls on appellee to demonstrate that the discretionary good cause provision has been applied in a manner

* *Seagram v. Hostetter* indicated that the good cause provision might be relevant to ameliorate potential conflicts between the price affirmation law and the federal antitrust laws where the conflicts were "entirely too speculative" to create constitutional problems. 384 U.S. at 46. *Seagram* in no way indicated that the good cause provision could be invoked to cure a constitutional defect arising out of an "extraterritorial thrust" as "plain" as that in *Healy*. See 692 F.2d at 282.

that eliminates the constitutional defect. Appellee has not made any such showing.*

B. *Seagram v. Hostetter* Is Inapplicable to the Present Case

It is *Seagram v. Hostetter*, rather than *Healy*, that is distinguishable from the present case. The statute in *Seagram* required that prices charged for alcoholic beverages in New York be no higher than those charged elsewhere during the *previous* month. The statute did not, like the present New York statute, require manufacturers, importers or producers to adhere *prospectively* in other states to minimum prices fixed by New York's posting and affirmation laws. Thus, the statute in *Seagram* did not, on its face, "limit the freedom of a manufacturer at any given time to raise or lower prices in any other state." See *Healy, supra*, 692 F.2d at 283.

The distinction between *Seagram* and the present case is underscored by the Court's statement in *Seagram*, in the context of a facial challenge to a retrospective price affirmation statute, that claims regarding the extraterritorial effects of the statute were "largely matters of conjecture," to be considered only on the basis of a more concrete presentation. 384 U.S. at 41, 43. In contrast, as the court in *Healy* found, prospective affirmation provisions—like the one presently before the Court—inevitably have constitutionally proscribed extraterritorial effects on the pricing and marketing of alcoholic beverages. The fact that the

* The lack of evidence on this point is unsurprising. Since affirmation statutes are in effect in approximately twenty states, it is hard to see how discretionary mid-month adjustments—which would have to be made concurrently in each state—could as a practical matter ever be attempted, let alone effected.

Court left *Seagram* intact when it summarily affirmed the decision in *Healy* is ample basis upon which to reject appellee's contention that *Seagram* is determinative of the case at bar. See also *Bacchus Imports, Ltd. v. Dias*, — U.S. —, 104 S. Ct. 3049, 3061 and n.10 (1984) (Stevens, J., dissenting).*

Despite all the foregoing, appellee has pressed its contention that the present case is governed by *Seagram v. Hostetter* rather than by *Healy*. We respectfully submit that that contention is incorrect and that *Seagram* should be confined to its narrow facts, in part because the factual premise underlying *Seagram* has proven to be unfounded and in part because, in the nineteen years since *Seagram*, there has been a substantial evolution in this Court's view of the interplay between the Commerce Clause and Section 2 of the Twenty-first Amendment.

1. The Factual Premise Underlying *Seagram* Has Proven to Be Unfounded

Even if *Seagram v. Hostetter* were not distinguishable from *Healy* on the grounds discussed above, we submit that New York's current price affirmation statute should be held unconstitutional. As noted previously, the Court in *Seagram* was confronted with a facial challenge to a statute

* The distinction between *Seagram* and *Healy* was once again at issue in 1984, the year after *Healy*, when the Court summarily dismissed an appeal from the New Mexico Supreme Court's decision upholding a price affirmation statute almost identical to the statute in *Seagram*. See *United States Brewers Ass'n, Inc. v. Director, Department of Alcoholic Beverage Control*, 100 N.M. 216, 668 P.2d 1093 (1982), appeal dismissed sub nom. *United States Brewers Ass'n, Inc. v. Rodriguez*, — U.S. —, 104 S. Ct. 1581 (1984). *Rodriguez*, like *Seagram*, arose out of a facial attack on a retrospective price affirmation provision that had not yet gone into effect. Indeed, by the time *Rodriguez* reached this Court, the retrospective price affirmation provision had been replaced by one requiring a prospective affirmation. See 668 P.2d at 1094 n.1, 1097-98.

that had not even gone into effect. See 384 U.S. at 41. Recognizing that it was unable to identify in that context the effect such a statute might have on interstate commerce, the Court expressly reserved judgment on the constitutionality of the statute as applied, so that the effect of the statute could be better understood and measured on the basis of actual experience. As the Court stated: "It will be time enough to assess the alleged extraterritorial effects of § 9 when a case arises that clearly presents them." 384 U.S. at 43; see also *id.* at 52.*

Since *Seagram* was decided nineteen years ago, intervening events have clarified the effect that retrospective price affirmation statutes would in practice have on interstate commerce. Foremost, as appellee concedes, the State of New York amended its statute in 1967 to the prospective formulation now before the Court. This amendment was passed in "an attempt to avoid practical problems arising from the operation of the former law." Motion to Dismiss or Affirm at 3. The district court in *Seagram v. Gazzara*, *supra*, provided a more detailed description of the problems that led to the amendment:

"The statute was amended because its requirement of an affirmation based on the preceding month's prices had proven unworkable in a number of respects. Among them was the effect such a requirement had on a distiller's ability to raise prices in other states with affirmation requirements.

* Should the Court determine that the record herein is similarly insufficient to assess the effects of the present New York statute on interstate commerce—a conclusion that would appear unnecessary in light of *Healy*—we would urge the Court to again couch its opinion, as it did in *Seagram*, in a manner that would permit the lower courts to entertain challenges to price affirmation statutes upon a showing of the adverse effects upon interstate commerce that result from such statutes.

A distiller could not raise prices in any state with an affirmation requirement based on *current* prices unless it *simultaneously* discontinued sales for a month in each state having an affirmation requirement based on the *preceding* month's prices. Nor could a distiller raise prices in any state with an affirmation requirement based on the preceding month's prices unless it first discontinued sales for a month in all other states having that requirement. At the urging of numerous distillers, among others, the law was amended to require an affirmation based upon *current* prices. See generally N.Y.L. 1967 ch. 798, Governor's Bill Jacket." 610 F. Supp. at 675 n.3 (emphasis in original).*

Although thus admitting that the statute at issue in *Seagram v. Hostetter* had in fact placed substantial burdens on interstate commerce, appellee and the district court in *Seagram v. Gazzara* take the position that the current New York statute must be constitutional because it could not possibly be as disruptive to interstate commerce as the original statute had proven. See Motion to Dismiss or Affirm at 5 n.7; *Seagram v. Gazzara*, *supra*, 610 F. Supp. at 678 & n.6. This analysis ignores two critical factors: First, the current New York price affirmation statute, like the statute that was invalidated in *Healy*, has substantial adverse effects upon commerce that takes place solely in other states—effects that render the statute unconstitutional regardless of how the burdens it imposes may compare with the burdens imposed by other regulatory programs. Second, the Court in *Seagram v. Hostetter* did

* The same legislative scenario developed in the case that led to this Court's ruling in *United States Brewers Ass'n, Inc. v. Rodriguez*. The retrospective affirmation provision in that case never went into effect, since it was amended and changed to a prospective scheme while the *Rodriguez* litigation was pending. See page 16 n.*, *supra*,

not address the actual effect of the original New York price affirmation statute. See 384 U.S. at 41, 43. Thus, it is inappropriate to invoke *Seagram* in support of an argument that the current statute is constitutional because its adverse effects are arguably less pernicious than those of the original statute.

The most significant element of *Seagram v. Gazzara* is not, however, its unavailing effort to apply this Court's ruling in *Seagram v. Hostetter* to the present New York affirmation statute. What is significant is the district court's acknowledgement that the statute at issue in *Hostetter* had been recognized to be unworkable because of the burdens it imposed on interstate commerce. This factor, coupled with (a) the Commerce Clause and Twenty-first Amendment precedents condemning state regulations imposing extraterritorial effects (see, e.g., *Baldwin v. G.A.F. Seelig, Inc.*, *supra*; *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, *supra*) and (b) the Commerce Clause precedents invalidating state laws which unduly burden interstate commerce (see, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)), indicates that *Seagram v. Hostetter* should be narrowly confined to the situation as it was presented to the Court in 1966.

2. The Law Regarding the Twenty-first Amendment Has Evolved Substantially Since *Seagram*

The Court's interpretation of Section 2 of the Twenty-first Amendment has evolved substantially since *Seagram v. Hostetter*. The Twenty-first Amendment gives broad power to the states to regulate the importation and use of intoxicants within their borders. It permits them, in some instances, to burden interstate commerce involving alcoholic beverages in ways that would be constitutionally impermissible if other items of commerce were involved.

See, e.g., *Capital Cities Cable, Inc. v. Crisp*, — U.S. —, 104 S. Ct. 2694, 2707 (1984). Although early cases described the states' powers under the Twenty-first Amendment in expansive terms (see, e.g., *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59, 62-63 (1936)), more recent decisions, particularly those in the period following *Seagram v. Hostetter*, have placed a greater emphasis on countervailing federal interests such as the federal interest in favoring vigorous competition. See *Bacchus Imports, Ltd. v. Dias*, 104 S. Ct. 3049, 3058 (1984):

"[I]n *Midcal Aluminum*, *supra*, at 109, 100 S. Ct. at 945, the Court, noting that recent Twenty-first Amendment cases have emphasized federal interests to a greater degree than had earlier cases, described the mode of analysis to be employed as a 'pragmatic effort to harmonize state and federal powers.' The question in this case is thus whether the principles underlying the Twenty-first Amendment are sufficiently implicated by the exemption for okolehao and pincapple wine to outweigh the Commerce Clause principles that would otherwise be offended."

In discussing the principles underlying the Twenty-first Amendment's reservation of powers to the states, the Court in *Bacchus* placed particular emphasis upon the promotion of temperance. 104 S. Ct. at 3058-59. See also *Capital Cities Cable, Inc. v. Crisp*, — U.S. —, 104 S. Ct. 2694, 2708 (1984); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 113-14 (1980); *Battipaglia v. New York State Liquor Authority*, 745 F.2d 166, 180 (2d Cir. 1984) (Winter, J., dissenting) *cert. denied*, — U.S. —, 105 S. Ct. 1393 (1985); *Loretto Winery, Ltd. v. Gazzara*, 601 F. Supp. 850, 860-61 (S.D.N.Y.), *aff'd*, 761 F.2d 140 (2d Cir. 1985). No claim

has been made that the New York price affirmation law promote temperance.

Under the approach summarized in *Bacchus*, it is doubtful that the Twenty-first Amendment provides any protection to price affirmation laws that are subject to Commerce Clause challenge. The absence of any connection between price affirmation and temperance, together with the highly burdensome effects of retrospective affirmation statutes (effects that are now conceded by the appellee, as they have been conceded by the New York State legislature), strongly suggest that under the balancing test applied in *Bacchus*, *Capital Cities Cable* and *Midcal*, the scale would today tip against a statute of the kind that was before this Court in *Seagram v. Hostetter*.

CONCLUSION

For the reasons stated above, the judgment of the Court below should be reversed.

December 2, 1985

Respectfully submitted,

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AMICUS CURIAE

BRIEF

DEC 2 1985

JOSEPH P. SPANGL, JR.
CLERK

IN THE
Supreme Court of the United States
October Term, 1985

BROWN-FORMAN DISTILLERS CORPORATION,
Appellant,
against
STATE OF NEW YORK LIQUOR AUTHORITY,
Appellee.

On Appeal from the Court of Appeals
of the State of New York

**BRIEF OF THE DISTILLED SPIRITS COUNCIL
OF THE UNITED STATES, INC.
AS AMICUS CURIAE**

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No. 84-2030

IN THE
Supreme Court of the United States
October Term, 1985

BROWN-FORMAN DISTILLERS CORPORATION,

Appellant,

against

STATE OF NEW YORK LIQUOR AUTHORITY,

Appellee.

On Appeal from the Court of Appeals
of the State of New York

**BRIEF OF THE DISTILLED SPIRITS COUNCIL
OF THE UNITED STATES, INC.
AS AMICUS CURIAE**

This brief is submitted, upon consent of all parties to this appeal, on behalf of the Distilled Spirits Council of the United States, Inc. ("DISCUS") as *amicus curiae* in support of the Appellant's challenge to the constitutionality of the New York liquor affirmation statute, N.Y. Alco. Bev. Cont. Law 101-b-3(d)-(i) (McKinney 1970).

Interest of *Amicus Curiae*

DISCUS is the principal trade association of the producers and importers of distilled spirits products in the United States. The members of DISCUS produce or import approximately 85% of the distilled spirits beverage products sold in the United States. DISCUS members include both large national liquor suppliers, including Appellant Brown-Forman Distillers Corporation, and numerous regional liquor suppliers. Most members of DISCUS sell liquor products in New York, and are, accordingly, subject to the New York liquor affirmation statute at issue and to similar affirmation statutes and regulations in other states.

The issue presented on this appeal is a crucial one for DISCUS members because the New York affirmation statute prohibits localized competition in liquor pricing in any of the forty-nine states (and the District of Columbia) outside New York by prospectively requiring that DISCUS members' New York prices be their lowest prices anywhere in the nation. For example, DISCUS members selling liquor products in New York are prohibited from affording lower prices to citizens of other states in any of the following circumstances in which local competition would otherwise dictate lower prices:

— Due to disparities in climate and demographics throughout the United States, there are tremendous differences in consumer preferences for liquor products in different states. For example, scotch whiskey is the largest selling liquor product in New York, while vodka is the largest seller in California, brandy is the largest seller in Wisconsin and Canadian whiskey is

the largest seller in Minnesota.* The New York affirmation statute prohibits state-by-state price differentials in DISCUS members' products, which would otherwise be dictated in competitive response to such regional liquor buying preferences;

— DISCUS members are prohibited by the New York affirmation statute from charging different prices in other states to meet different "seasonal" marketing conditions in different locales. For example, due to the climate differences between New York, on the one hand, and Florida and Arizona, on the other, the seasons in which "white" liquors such as gin, vodka and rum are the most popular is the *summer* season in New York, but the *winter* season in Florida and Arizona (where many northerners spend winter vacations). However, the New York affirmation statute prohibits localized seasonal price discounting which would otherwise be the logical market response to these circumstances;

— Most DISCUS members compete with various regional liquor brands that are offered for sale in only one or a few states. The owners of these regional brands are able to price their liquor in accordance with the competitive and taste dictates of the local markets they serve. To the detriment of purchasers in these local markets, however, the New York affirmation statute directly prohibits liquor suppliers who sell in New York from lowering their out-of-state liquor prices below their scheduled New York prices to meet the competition of such local brands;

— The New York affirmation statute prohibits any localized price experimentation or test marketing of liquor products involving differentials in pricing between different states; and

* See JORSON'S LIQUOR HANDBOOK at 62 (1985).

— As applied by the Court of Appeals below, the New York statute was enforced even to prevent a liquor supplier from offering out-of-state wholesalers cash incentives not tied to the purchase of any particular product despite the fact that such cash incentives are specifically allowed under federal ATF Ruling 77-17, Liquor Cont. L. Serv. (CCH) ¶ 30,353 at 30,344.

Since the New York affirmation statute directly controls minimum pricing in other states so as to deprive liquor brand owners of any ability to compete on a localized basis, DISCUS firmly believes that the statute violates the Commerce Clause of the United States Constitution. U.S. Const. art. I, § 8, cl. 3. This Court has consistently held that where a state statute directly controls the out-of-state pricing of any commodity, it “is a prohibited regulation and invalid, regardless of the purpose with which it was enacted.” *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 199 (1925).

Summary of Argument

It is respectfully submitted that the disposition of the instant appeal should be governed by *United States Brewers Association v. Healy*, 692 F.2d 273 (2d Cir. 1982), *aff'd*, 464 U.S. 909 (1983). *Healy* struck down as facially violative of the Commerce Clause a substantially identical Connecticut beer affirmation statute on the ground that the statute, like the New York statute at issue here, required beer suppliers to “file a sworn affirmation that its posted per-unit prices *will be* no higher than its prices for corresponding units sold in any [bordering] state . . . during the month covered by the posting.” 692 F.2d at 277 (emphasis

supplied). Following a long line of Supreme Court precedent, *Healy* invalidated the Connecticut statute on the ground that it constituted a direct regulation of pricing in other states in violation of the Commerce Clause. See Point I, *infra*.

The court below erred in relying upon *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966), for that decision addressed only a predecessor version of the New York affirmation statute, which, in contrast to the present statute, did not *prospectively* regulate pricing in other states. The predecessor statute in *Seagram v. Hostetter* required an affirmation that New York liquor prices in any given month would be no higher than those charged in any other state in the *preceding* month, and thus did not, at least on its face, impose any regulation of current or prospective pricing in other states. *Seagram v. Hostetter* should have no application to statutes, such as the New York statute at issue, which *prospectively* or *concurrently* impose minimum prices on sales in other states. See Point II.D, *infra*.

Nor can the statute be saved on the ground that numerous other states have imposed affirmation statutes or “Des Moines Warranty” regulations similar to those imposed in New York. To our knowledge, this Court has never considered the number of states that have enacted a statute to have any bearing upon the statute’s constitutionality under the Commerce Clause. See, e.g., *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) (striking down Illinois tender offer statute despite the existence of numerous similar statutes in other states). More fundamentally, even where a majority of the fifty states choose to impose similar statutes or regulations controlling pricing in other states,

the Commerce Clause is nevertheless violated because there is unwanted extraterritorial regulation of pricing in the remaining states. *See* Point I.C, *infra*.

It is also submitted that the New York affirmation statute is unconstitutionally protectionist. The statute affords price protection to New York liquor purchasers at the expense of out-of-state purchasers, who are denied the opportunity to purchase liquor products in their states at lower prices dictated by local competition.* *See* Point II, *infra*.

Finally, the Twenty-First Amendment does not save the New York affirmation statute. The Amendment provides no protection to state liquor statutes that regulate or control transactions beyond a state's borders. And, in any event, the Amendment is not operative here because the New York affirmation statute does not relate to any purpose of the Twenty-First Amendment. *See* Point III, *infra*.

ARGUMENT

POINT I

The New York affirmation statute is unconstitutional on its face because it directly regulates pricing in other states.

This Court has repeatedly held that where a state regulation directly controls the out-of-state pricing of any commodity, it "is a prohibited regulation and invalid, regardless of the purpose with which it was enacted." *Shafer v. Farmers Grain Co.*, 268 U.S. at 199. *See, e.g., Edgar v.*

* Similar affirmation statutes or regulations in other states similarly deny to New York purchasers the benefits of lower prices which might be dictated by local competition in New York.

MITE Corp., 457 U.S. at 641-43; *Lemke v. Farmers Grain Co.*, 258 U.S. 50 (1922); *Healy*, 692 F.2d at 282. Since the New York affirmation statute, on its face, directly and prospectively controls the minimum prices a liquor brand owner may offer in any other state, the statute is facially violative of the Commerce Clause.

A. ***Healy* Held That A Statute Substantially Identical To The New York Affirmation Statute Was Unconstitutional On Its Face.**

The constitutional infirmity of the New York affirmation statute is conclusively established by the decision in *Healy*. *Healy* held that a materially identical Connecticut affirmation statute was facially violative of the Commerce Clause because it prospectively regulated the minimum price of beer in other states by requiring every beer manufacturer selling in Connecticut to "file a sworn affirmation that its posted per-unit prices *will be* no higher than its prices for corresponding units sold in any state bordering Connecticut *during the month covered by the posting.*" 692 F.2d at 277 (emphasis supplied) (footnote omitted). The *Healy* Court had no difficulty in finding that the extraterritorial nature of these provisions rendered the Connecticut affirmation statute unconstitutional:

[T]he extraterritorial thrust of the main beer price affirmation provisions, §§ 30-63a(b) and 30-63b(b), . . . is plain, for those sections prevent a brewer from selling below the Connecticut wholesaler price to any wholesaler in any neighboring state. In other words, these sections tell a brewer that for any given month when it sells beer to a wholesaler in Massachusetts, New York, or Rhode Island, it may not do so at a price lower than that it has previously announced it will charge to Connecticut wholesalers. As the district

court succinctly described it, “[b]ecause it is geared to the future, the Connecticut Statute effectively sets minimum prices for the four-state area once the price is posted in Connecticut on the thirteenth of the month.” 532 F. Supp. at 1329.

Thus, the obvious effect of the Connecticut statute is to control the minimum price that may be charged by a non-Connecticut brewer to a non-Connecticut wholesaler in a sale outside of Connecticut. Nothing in the Twenty-first Amendment permits Connecticut to set the minimum prices for the sale of beer in any other state, and well-established Commerce Clause principles prohibit the state from controlling the prices set for sales occurring wholly outside its territory.

692 F.2d at 282 (footnote omitted).

The present case is indistinguishable from *Healy*. The New York affirmation statute at issue identically regulates out-of-state minimum prices by requiring that a brand owner affirm “that the . . . price of liquor . . . set forth in [its monthly] schedule is no higher than the lowest price at which such item of liquor *will be sold . . . in any other state* of the United States . . . *during the calendar month for which such schedule shall be in effect . . .*” N.Y. Alco. Bev. Cont. Law § 101-b-3(d) (McKinney 1970) (emphasis supplied). As in *Healy*, the New York affirmation provisions, on their face, unconstitutionally “tell a [brand owner] that for any given month when it sells [liquor] to a wholesaler [in another state], it may not do so at a price lower than that it has previously announced it will charge to [New York] wholesalers.” *Healy*, 692 F.2d at 282.

Indeed, the New York affirmation statute effects an even greater burden on interstate commerce than that im-

posed by the Connecticut statute invalidated in *Healy*. The Connecticut statute was directed only to three surrounding states, while the New York statute “set[s] . . . minimum prices” in *every* other state. 692 F.2d at 282.

B. *Healy* Follows A Long Line Of Supreme Court Precedent Invalidating, Without Regard To Legislative Purpose, State Statutes That Directly Regulate Commerce In Other States

Where, as here, a state statute or regulation directly regulates the conduct of commerce in other states, the Supreme Court consistently has invalidated the regulation under the Commerce Clause, regardless of whether its purpose was protectionist or discriminatory. *See, e.g., Edgar v. MITE Corp.*, 457 U.S. at 642-43; *Public Utilities Comm’n v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927); *Shafer*, 268 U.S. 189; *Lemke*, 258 U.S. 50; *Minnesota Rate Cases*, 230 U.S. 352, 396 (1913).

In *Edgar v. MITE Corp.*, the Supreme Court held that an Illinois takeover statute was facially invalid because the statute purported to control the conduct of nationwide tender offers, despite the circumstance that the statute plainly had no discriminatory purpose. The Court reasoned: “The Commerce Clause . . . permits only *incidental* regulation of interstate commerce by the States; direct regulation is prohibited.” 457 U.S. at 640 (emphasis in original). The Court concluded that “[i]nsofar as the Illinois law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law.” 457 U.S. at 644.

Similarly, in *Lemke v. Farmers Grain Co.*, the Supreme Court invalidated a North Dakota statute which, *inter alia*,

permitted state inspectors to set the profit margins for all grain purchasers at North Dakota grain elevators, including out-of-state purchasers, even though there was no showing that the margins set were discriminatory. The Supreme Court's reasoning in *Lemke* is equally applicable here:

[T]he principles recognized in decisions of this court which permit the State to make local laws under its police power in the interest of the welfare of its people, which are valid although affecting interstate commerce . . . ha[ve] no application where the State passes beyond the exercise of its legitimate authority and undertakes to regulate interstate commerce by imposing burdens upon it.

258 U.S. at 58-59. *Accord Shafer*, 268 U.S. at 199 (state's regulation of in-state wheat sales to prevent unreasonable profits on resale out-of-state held violative of the Commerce Clause, irrespective of legislative purpose); *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. at 89 (Rhode Island Utility Commission's rate order covering a local utility's sale of electricity to Massachusetts held unconstitutional because "the imposition of a direct burden upon interstate commerce . . . must necessarily fall, regardless of its purpose"); *Minnesota Rate Cases*, 230 U.S. at 396 ("if a state enactment imposes a *direct burden* upon interstate commerce, it must fall . . .") (emphasis in original).

Indeed, in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), the Supreme Court invalidated a New York "equal price" statute similar to the New York affirmation statute at issue here. The statute in *Seelig* required distributors selling milk in New York to warrant that if they purchased

milk from producers outside New York, they would pay a price no lower than the price charged by New York producers for similar milk. 294 U.S. at 520. Although the Court did find that New York's statute was protectionist in purpose, the statute was struck down as a *direct* restraint on interstate commerce. 294 U.S. at 521-22, 525-26, 528. The foundation for the decision in *Seelig* should govern here:

New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there.

294 U.S. at 521.

Applying the rule of law set forth in *Seelig* and *Healy*, the New York affirmation statute transgresses the Commerce Clause because it directly imposes minimum out-of-state liquor prices for a month-long period. As stated by Justice Cardozo in *Seelig*, "New York has no power to project its legislation into [other states] by regulating the price to be paid in [those] state[s] for [products] acquired there." 294 U.S. at 521.

C. *Healy* Cannot Properly Be Distinguished

The court below attempted to distinguish *Healy* on the principal ground that the Connecticut statute, unlike the New York statute, was enacted with a discriminatory purpose. See *Brown-Forman Distillers Corp. v. State Liquor Authority*, 64 N.Y.2d 479, 488, 490 N.Y.S.2d 128, 132, 479 N.E.2d 764, 769 (1985). This holding, however, ignored the plain fact that the *Healy* court expressly declined to reach the issue of discriminatory purpose or effect, holding the

statute invalid on its face because it *directly* imposed a floor on minimum prices in other states:

Plaintiffs have launched an all-out attack on the Connecticut beer price affirmation provisions under the Commerce Clause contending, *inter alia*, that the statute was enacted with a discriminatory purpose, that it will have a discriminatory effect, that it burdens interstate commerce by restricting the movement of consumers across state lines, and that the law is ill-suited to achieve Connecticut's goals. *We need reach none of these contentions, however, in order to find the beer price affirmation provisions on their face an impermissible burden on commerce, for it is evident that the Connecticut statute seeks to regulate prices not just in Connecticut but in its surrounding states as well.*

692 F.2d at 281-82 (emphasis supplied) (footnotes omitted).

Thus, while a state statute that only *incidentally* affects interstate commerce may be upheld under a "balancing test" if its purpose is nondiscriminatory, *see, e.g., Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *Seagram v. Hostetter*, 384 U.S. 35, a statute that, as here, *directly* tells a business what it can or cannot do in other states is invalid on its face. As the *Healy* court stated:

If the purpose or effect of a state's law is to regulate conduct occurring wholly outside the state, the burden on commerce is generally held impermissible, and the fact that the law may not have been intended as protectionist or discriminatory will not save it. In *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 199, 45 S.Ct. 481, 485, 69 L.Ed. 909 (1925), the Court stated that "a state statute which by its necessary operation directly interferes with or burdens such commerce is

a prohibited regulation and invalid, regardless of the purpose with which it was enacted." Thus, it has been held repeatedly that where the practical effect of a state's legislation is to control conduct in *other* states, the regulation violates the Commerce Clause.

692 F.2d at 279 (emphasis in original).

Under *Healy*, since the New York affirmation statute, on its face, directly controls minimum pricing in other states for a month-long period, it "is a prohibited regulation and invalid, regardless of the purpose with which it was enacted." *Healy*, 692 F.2d at 279, quoting *Shafer*, 268 U.S. at 199.

The court below also attempted to distinguish *Healy* on the ground that the Connecticut statute at issue there only applied to three bordering states, while the New York statute at issue here is "nationwide in scope, and imitated by approximately 20 other States." *Brown-Forman*, 64 N.Y.2d at 488, 490 N.Y.S.2d at 133, 479 N.E.2d at 769. Plainly, the New York statute, which applies to *all* other states, imposes greater burdens upon interstate commerce than the Connecticut statute's regulation of just three states. More fundamentally, as respects the various other states that have followed the New York model by enacting liquor affirmation statutes of their own, this Court repeatedly has observed that one of the great evils of state regulations which burden interstate commerce is the danger that other states will be forced to respond with burdensome regulations of their own. In *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951), this Court stated that "*placing a discriminatory burden on interstate commerce would invite a multiplication of preferential trade areas destructive of the*

very purpose of the Commerce Clause.” *Id.* at 356 (emphasis supplied). More recently, the decision in *Bacchus Imports, Ltd. v. Dias*, 104 S. Ct. 3049, 3058 (1984), cautioned that the Commerce Clause is intended to prevent precisely such “economic Balkanization” as results when, as here, numerous states erect barriers to free competition outside their borders.

Additionally, the attempt to distinguish *Healy* based upon other states’ imposition of affirmation regulations similar to the New York statute is misplaced because it fails to address the determinative circumstance that there remain numerous states which impose no such regulations and whose citizens are being deprived of the ability to purchase liquor products at lower prices dictated by local competition. Plainly, these states should not be subjected to extraterritorial price regulation. *See Healy, Shafer, Lemke, Minnesota Rate Cases.**

Finally, we believe that Appellee’s reliance upon *Joseph E. Seagram & Sons, Inc. v. Gazzara*, 610 F. Supp. 673 (S.D.N.Y. 1985), *appeal pending*, No. 85-7547 (2d Cir.), is misplaced. The *Seagram v. Gazzara* decision, while explicitly rejecting *all* of the grounds upon which the court below relied to distinguish *Healy*, *see* 610 F. Supp. at 676-77 n.4, upheld the facial constitutionality of the New York affirmation statute on the narrow ground that the portion of the New York affirmation statute requiring brand

* In fact, some states, such as the State of Kentucky, have recently repealed affirmation statutes, presumably expressing a public policy opposing such extraterritorial price regulation. *See* 82 BR 974, HB 571, *repealing* Ky. Rev. Stat. § 244.245. The interest of Kentucky and other non-affirmation states in permitting open competition is totally thwarted by the New York affirmation statute, which places a floor on prices chargeable in these states.

owners to file monthly price schedules in New York, N.Y. Alco. Bev. Cont. Law § 101-b-3(a), vests the State Liquor Authority with discretion to allow a brand owner to sell liquor in New York at prices other than those set forth in its price schedule upon “‘prior written permission of the [SLA] . . . for good cause shown and for reasons not inconsistent with the purpose’ of the statute.” 610 F. Supp. at 677, *quoting* N.Y. Alco. Bev. Cont. Law § 101-b-3(a). The *Seagram v. Gazzara* court avoided reaching the conclusion mandated under *Healy* solely by reading this discretionary waiver provision to permit the State Liquor Authority, in writing, to waive application of the affirmation statute “for good cause shown.” *Id.*

The *Seagram v. Gazzara* court’s reliance upon the “good cause” waiver provision of N.Y. Alco. Bev. Cont. Law § 101-b-3 (a) to validate the New York affirmation statute was patently erroneous. A clear, consistent and uncontradicted line of Commerce Clause precedent holds that a state regulation which otherwise unconstitutionally regulates out-of-state conduct cannot be saved by a provision vesting the governing state agency with discretion to waive or exempt parties from application of the statute. *See, e.g., Public Utilities Comm’n v. United States*, 355 U.S. 534 (1958) (statute authorizing commission, *in its discretion*, to exempt common carriers from the requirement of transporting federal property only at posted rates was nevertheless held facially unconstitutional); *Lemke*, 258 U.S. 50 (statute authorizing state grain inspector, *in his discretion*, to set profit margins on out-of-state grain sales was nevertheless struck down as a facially impermissible burden on commerce); *Telvest, Inc. v. Bradshaw*, 547 F. Supp. 791 (E.D. Va. 1982); *aff’d*, 697 F.2d 576 (4th Cir. 1983) (state take-

over statute which authorized commission, *in its discretion*, to exempt certain purchasers of stock from disclosure requirements was nevertheless held facially violative of the Commerce Clause).

A statute is no less unconstitutional because its impermissible effects may not arise in every instance. A finding that a state agency *may*, in its discretion, apply a statute in a *constitutional* manner, does not save the statute where the statute also gives the agency the discretion to apply it in an *unconstitutional* manner. See *Public Utilities Comm'n v. United States*, 355 U.S. 534; *Lemke*, 258 U.S. 50; *Telvest*, 697 F.2d 576.

D. *Seagram v. Hostetter* Has No Application Here

We submit, moreover, that the court below erred in relying upon *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35, to uphold the constitutionality of the present New York affirmation statute. The *Healy* decision makes clear that any "reliance on *Joseph E. Seagram & Sons v. Hostetter*, . . . as sanctioning [prospective] affirmation provisions, is misplaced." 692 F.2d at 282. *Seagram v. Hostetter* involved a facial challenge to the pre-1967 version of the New York affirmation statute, which required "an affirmation that the . . . price of liquor . . . is no higher than the lowest price at which sales were made anywhere in the United States during the *preceding* month." 692 F.2d at 283, quoting *Hostetter*, 394 U.S. at 39-40 (emphasis supplied). Unlike the present New York statute's *prospective* regulation of out-of-state prices, the pre-1967 statute, on its face, utilized *past* out-of-state pricing as a reference point to regulate maximum prices within New York. The pre-

1967 statute thus did not, on its face, directly control current or future pricing in other states, and was therefore upheld on a facial challenge in *Seagram v. Hostetter*. See *Healy*, 692 F.2d at 283.

By contrast, since the present New York statute, like the statute struck down in *Healy*, prohibits brand owners *prospectively* from selling liquor in other states below their scheduled New York prices for the one-month period that their New York price schedules are in effect, the statute directly sets minimum prices in other states in violation of the Commerce Clause. As stated in *Healy*, the "balancing test" applied in *Seagram v. Hostetter* has no application to direct regulation of out-of-state pricing, which constitutes a *per se* violation of the Commerce Clause:

But nothing in *Seagram* purports to rule that a state may achieve its goal of price-parity by the far more drastic, and clearly excessive, method of controlling the minimum prices at which liquor may be sold outside of its own territory. We conclude that "[i]nsofar as the [Connecticut] statute burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law."

692 F.2d at 284 (quoting *Edgar v. MITE Corp.*, 457 U.S. at 644).

Thus, whatever the present vitality of the *Seagram v. Hostetter* decision, it is respectfully submitted that it has no application to the current New York affirmation statute, which, on its face, controls future minimum pricing outside of New York. As stated in *Healy*, "[i]nsofar as the . . . statute burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law." 692 F.2d at 284.

POINT II

The New York affirmation statute is unconstitutionally protectionist.

The New York affirmation statute is also unconstitutionally protectionist. The court below found that the New York affirmation statute was enacted to secure lower liquor prices for New York purchasers. *See Brown-Forman*, 64 N.Y.2d at 487, 490 N.Y.S.2d at 132, 479 N.E.2d at 768. This protection for the New York consumer, however, was effected at the expense of out-of-state liquor purchasers, who are prevented from purchasing liquor products at competitively determined prices which may, for certain products, be lower than those offered in New York.

The Commerce Clause decisions of the Supreme Court have made clear that "where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected." *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). *See Bacchus Imports, Ltd. v. Dias*, 104 S. Ct. 3049; *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511. "A finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose . . . or discriminatory effect." *Bacchus Imports*, 104 S. Ct. at 3055 (citations omitted).

The Supreme Court has repeatedly prohibited out-of-state price restraints, even where the benefit sought was

price equality. Thus, in *Seelig*, the Supreme Court rejected the argument that a New York milk price statute did not burden interstate commerce because it imposed only price equality, holding that the purpose and effect of the statute was unconstitutionally to protect the economic interests of New York milk producers at the expense of lower priced, out-of-state competition. Justice Cardozo's decision in *Seelig* concludes with reasoning that should also govern here:

It is one thing for a state to exact adherence by an importer to fitting standards of sanitation before the products of the farm or factory may be sold in its markets. *It is a very different thing to establish a wage scale or a scale of prices for use in other states, and to bar the sale of the products, whether in the original packages or in others, unless the scale has been observed.*

294 U.S. at 528 (emphasis supplied). *Accord Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977).

Similarly, in *Schwegmann Brothers Giant Super Markets v. Louisiana Milk Comm'n*, 365 F. Supp. 1144 (M.D. La. 1973), *aff'd*, 416 U.S. 922 (1974), the court enjoined enforcement of Louisiana minimum milk price regulations against out-of-state milk products sold to distributors within Louisiana. Citing *Seelig*, the *Schwegmann* court held that a state may not, to protect "its inhabitants, neutralize an economic advantage possessed by a neighboring state by imposing its minimum price standards on the products purchased in that neighboring state." 365 F. Supp. at 1154.

Like the regulations struck down in *Seelig* and *Schwegmann*, the New York affirmation statute, solely for the

economic benefit of in-state purchasers, prospectively "establish[es] . . . a scale of prices for use in other states, and . . . bar[s] the sale of the products . . . unless the scale has been observed" in direct contravention of the Commerce Clause. *Seelig*, 294 U.S. at 528. More fundamentally, as in *Seelig* and *Schwegmann*, New York's affirmation statute is unconstitutionally protectionist because it acts to "neutralize an[y] economic advantage possessed by [liquor purchasers in] a neighboring state by imposing its minimum price standards on the products purchased in that . . . state." *Schwegmann*, 365 F. Supp. at 1154.

This Court has made clear that not only is discrimination against out-of-state *businesses* prohibited, but that economic restraints intended solely to benefit local *citizens* at the expense of *citizens* in other states are also constitutionally invalid. See *Philadelphia v. New Jersey*, 437 U.S. at 626-27 (overturning a New Jersey statute prohibiting the importation of out-of-state waste); *New England Power Co. v. New Hampshire*, 455 U.S. 331 (invalidating an order of the New Hampshire Public Utilities Commission which prohibited the New England Power Company from transmitting inexpensive hydroelectric power to out-of-state consumers).*

* The *Seagram v. Gazzara* decision, in rejecting the contention that the New York affirmation statute is protectionist, strained to equate the New York affirmation statute, which sets an extraterritorial floor on liquor prices available to out-of-state purchasers, with non-extraterritorial "statutes such as a property tax abatement intended to encourage businesses to relocate to a state, a statute establishing a commission to take measures to increase a state's share of the tourist trade, or any other statute that sought to draw business away from another state." 610 F. Supp. at 680 n.8. However, the *Sea-*

(footnote continued on next page)

Plainly, the New York affirmation statute, which denies out-of-state purchasers the benefits of local competition in liquor pricing in order to protect New York purchasers, is unconstitutionally protectionist under *Philadelphia v. New Jersey* and *New England Power*.

Nor does the circumstance that New York enacted its affirmation statute in response to similar "Des Moines Warranty" requirements imposed by *other* states render the New York statute any less protectionist.* As the Supreme Court recently noted in *Bacchus Imports, Ltd. v.*

gram v. Gazzara court's analysis does not bear scrutiny. Out-of-state citizens are totally denied the benefits of local price competition as a result of the New York affirmation statute, as contrasted with the out-of-state citizens in the hypothetical statutes presented by the *Seagram v. Gazzara* court, who suffer no restraints whatever.

* The *Seagram v. Gazzara* court makes extended reference to the fact that several "monopoly" states—those "control states" in which only the state itself lawfully may purchase for resale liquor products from distillers and importers—have maintained "Des Moines Warranty" provisions in their purchase contracts that are similar to a "lowest price" affirmation requirement. 610 F. Supp. at 680-81. The opinion correctly notes that the pre-1967 version of the New York affirmation statute and similar statutes enacted by other states were designed to provide citizens of the respective states with similar protections. *Id.* However, the circumstance that more than one state has effected an unconstitutional regulation does not serve to validate the regulation in any state. As the *Seagram v. Gazzara* court itself noted in criticizing the *Brown-Forman* decision, "as a matter of constitutional theory, we doubt that the validity of a statute under the Commerce Clause can depend upon how many states have enacted it." 610 F. Supp. at 676-77.

In fact, the Commonwealth of Pennsylvania, one of the "control" states referred to by the *Seagram v. Gazzara* court as "monopoly states", has twice petitioned the United States Supreme Court for leave to file an original jurisdiction complaint to secure a declaratory ruling invalidating *all* of the various states' "affirmation" or "Des Moines Warranty" regulations on the ground that they have totally eviscerated local price competition. Both petitions were denied, *without opinion*. See *Pennsylvania v. Alabama*, 105 S. Ct. 3473 (1985); *Pennsylvania v. New York*, 407 U.S. 206 (1972).

Dias, the Commerce Clause is intended to prevent precisely such "economic Balkanization," wherein states each erect barriers to free competition from outside their borders. 104 S. Ct. at 3058.

In short, the New York affirmation statute is unconstitutionally protectionist, not simply because it *advantages* New Yorkers, but because it *disadvantages* out-of-state purchasers by denying them the benefits of lower, competitively set prices in their respective states. See *Schwegmann*, 365 F. Supp. at 1154, *aff'd*, 416 U.S. 922 (1974).

POINT III

The Twenty-First Amendment does not protect state statutes controlling pricing in other states.

A. The Twenty-First Amendment Does Not Protect Regulations Which Seek To Control Liquor Transactions Beyond A State's Borders

Section 2 of the Twenty-First Amendment, on its face, applies only to *in-state* regulations:

The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U.S. Const. amend. XXI, § 2 (emphasis supplied).

The Supreme Court has consistently refused to accord Twenty-First Amendment protection to state liquor regulations that purport to control liquor transactions beyond the state's jurisdiction. See *Healy*, 692 F.2d at 282; *United*

States v. State Tax Comm'n, 412 U.S. 363 (1973); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 333-34 (1964); *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938).

Since the New York affirmation statute, on its face, directly controls the minimum prices that may be charged by liquor brand owners *outside* of the state, the Twenty-First Amendment is inapplicable. As held in *Healy*:

Thus, the obvious effect of the Connecticut statute is to control the minimum price that may be charged by a non-Connecticut brewer to a non-Connecticut wholesaler in a sale outside of Connecticut. *Nothing in the Twenty-first Amendment permits Connecticut to set the minimum prices for the sale of beer in any other state*, and well-established Commerce Clause principles prohibit the state from controlling the prices set for sales occurring wholly outside its territory.

692 F.2d at 282 (emphasis supplied). Accord *United States v. State Tax Comm'n*, 412 U.S. 363 (state may not control pricing of liquor on federal military bases within the state); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (state may not control pricing of airport liquor sales for overseas consumption); *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (state may not enforce its liquor regulations in national parks located within state).

B. The Twenty-First Amendment Does Not Protect Statutes Which Do Not Relate To Any Purpose Of The Amendment

Moreover, in *Bacchus Imports, supra*, this Court recently confirmed that the Twenty-First Amendment will not shield from Commerce Clause condemnation state liquor

regulations which are unrelated to any purpose of the Amendment. 104 S. Ct. at 3058. See also *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110-111, 114 (1980); *Loretto Winery Ltd. v. Gazzara*, 601 F. Supp. 850 (S.D.N.Y.), *aff'd*, 761 F.2d 140 (2d Cir. 1985).

In *Bacchus*, this Court invalidated a Hawaiian excise tax provision that exempted certain locally produced liquors, despite Hawaii's contention that its statute constituted a purely *in-state* liquor regulation protected by the Twenty-First Amendment. In striking down Hawaii's liquor tax statute as unconstitutionally "protectionist" under the Commerce Clause, the Court found that the statute was "not supported by any clear concern of the Twenty-first Amendment." 104 S. Ct. at 3059. After carefully reviewing "the obscurity of the legislative history of [the Amendment]", *id.* at 3058, Justice White concluded for the majority that while the Twenty-First Amendment may have been intended to permit a state to prohibit liquor sales, foster temperance or protect against perceived social evils associated with liquor, "[s]tate laws that constitute mere economic protectionism . . . are . . . not entitled to the same deference [under the Amendment] as laws enacted to combat the perceived evils of an unrestricted traffic in liquor." *Id.*

Similarly, in *Loretto Winery Ltd. v. Gazzara*, the district court, in an opinion substantially adopted by the Second Circuit, invalidated a New York statute permitting grocery stores to sell only New York-produced wine, holding that the Twenty-First Amendment does not authorize state liquor regulation which is unrelated to prohibition or temperance:

Accordingly, what is to be balanced is the state interest in promoting "temperance" with the federal constitutional interest in free trade across state lines. *Only those state restrictions which directly promote temperance may now be said to be permissible under Section 2 of the Twenty-first Amendment.*

601 F. Supp. at 861 (emphasis supplied).

The reasoning set forth in *Bacchus* and *Loretto Winery* is equally applicable here. The New York affirmation statute, like the Hawaiian tax statute and New York wine statute, does not serve any of the purposes underlying the Twenty-First Amendment—prohibition, temperance or the prevention of social evils associated with liquor consumption. Rather, the statute's conceded purpose is to provide price protection to New York purchasers at the expense of the ability of purchasers in other states to pay lower prices arising from local interbrand competition.

Finally, this Court has held that even when a state can establish "Twenty-First Amendment" interests in a liquor pricing statute, those interests generally must yield to the federal interest in competition in interstate commerce. See *Midcal*, 445 U.S. at 110-111, 114. In *Midcal*, the Supreme Court struck down a California retail price maintenance statute under the Sherman Act, holding that any California interests in fostering temperance and protecting small liquor retailers were outweighed by the overriding "federal interest in enforcing the national policy in favor of competition" in interstate commerce embodied in the Sherman Act. 445 U.S. at 110-111. Since the New York affirmation statute, on its face, concededly interferes with competition in liquor pricing outside of New York, any conceivable state

interests underlying the statute should be deemed outweighed under the rationale of *Midcal*.

Conclusion

For all of the foregoing reasons, the Distilled Spirits Council of the United States respectfully submits that the decision and judgment below should be reversed, and the New York affirmation statute should be declared unconstitutional on its face in accordance with the decision in *United States Brewers Association v. Healy*.

Respectfully submitted,

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BRIEF

MOTION FILED
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No. 84-2030

IN THE
Supreme Court of the United States
October Term, 1985

BROWN-FORMAN DISTILLERS CORPORATION,
Appellant,

v.

STATE OF NEW YORK LIQUOR AUTHORITY,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF
NEW YORK

**Motion for Leave to File Brief as *Amicus Curiae* and Brief
of Wine and Spirits Wholesalers of America, Inc., as
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**Motion of Wine and Spirits Wholesalers of America, Inc.
for Leave to File Brief as *Amicus Curiae***

Pursuant to Rule 42 of the rules of the Court, the Wine and Spirits Wholesalers of America, Inc. ("WSWA") respectfully moves for leave to file the accompanying brief as *amicus curiae*. Appellee has consented to the filing of this brief; appellant has not.

Interest of WSWA

As the major national trade association for wholesale distributors of distilled spirits and wines, WSWA represents more than 800 members in 41 states.¹ Most member wholesalers conduct their distribution businesses pursuant to wholesale licenses issued by the "open" or "license" states (i.e., those which permit the distribution of alcoholic beverages by private enterprise concerns as distinguished from the minority of "monopoly" or "closed" states in which the state itself operates the business of wholesaling one or more types of alcoholic beverage). In keeping with the generally accepted need for governmental regulation of beverage alcohol, the open states subject each separate level of the trade to highly detailed but purposefully integrated regulatory complexes. Reflecting the individual policies of the particular state, these regulatory structures differ somewhat from state to state and beverage to beverage.

The decision below, reported as *Brown-Forman Distillers Corporation v. State of New York Liquor Authority*, 64 N.Y.2d 479, 490 N.Y.S.2d 128, 479 N.E.2d 764 (1985),² sustains the constitutionality of the so-called "affirmation" provision of New York's Alcoholic Beverage Control Law ("ABC Law") (§101-b subd. 3, pars. (d)-(i) (McKinney 1970)), pursuant to which any liquor supplier that wishes to sell an item of liquor to a licensed New York wholesaler must, *inter alia*, affirm that the price at which such items will be sold will be no higher than the lowest price at which that same item is contemporaneously offered for sale to wholesalers anywhere else in the United States, with "due allowance for differentials

¹Amicus is a not-for-profit corporation.

²The opinion appears in the appendix to the Jurisdictional Statement ("J.S. App.") at 1a.

in state taxes and fees, and in the actual cost of delivery." ABC Law §101-b, subd. 3, par. (g) (McKinney 1970). Suppliers (and wholesalers) must also file monthly schedules of their respective prices for the items to be sold by them, which prices must, except for good cause shown, remain in effect for the month for which filed. ABC Law §101-b, subd. 3, pars. (a), (b) and (c) (McKinney 1970).

Affirmation and price posting are integral parts of a broader, comprehensive regulatory scheme governing virtually every aspect of the operations of the alcoholic beverage industry in New York. Briefly stated, the general legislative policy of New York is, among other things "... to regulate and control the manufacture, sale and distribution within the state of alcoholic beverages ... for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to law ... in the public interest ... [and] for the protection, health, welfare and safety of the people of the state." ABC Law §2 (McKinney Supp. 1984). The specific legislative policy underlying the affirmation, posting and price limitations of section 101-b, again briefly stated, is "... to eliminate the undue stimulation of sales of alcoholic beverages and the practice of manufacturers and wholesalers in granting discounts, rebates, allowances, free goods and other inducements to selected licensees ...," ABC Law §101-b subd. 1 (McKinney 1970), and further to assure "that consumers of alcoholic beverages in this state should not be discriminated against or disadvantaged by paying unjustifiably higher prices for brands of liquor than are paid by consumers in other states ... and to forestall possible monopolistic and anti-competitive practices designed to frustrate the elimination of such discrimination and disadvantage" 1964 New York Laws, ch. 531, §8.

At least 18 other open states have enacted affirmation provisions identical or very similar to New York's,³ and at least 11 other states have price posting provisions requiring suppliers to file prices to wholesalers and to abide by those prices for a stated period of time.⁴

WSWA's members thus have a critical interest in sustaining the constitutional validity of affirmation, an interest wholly consistent with the public interest expressed by the New York Legislature—to avoid discriminatory pricing and to keep consumer prices low.

WSWA's members have a second and equally compelling interest in connection with this appeal. Virtually every aspect of the operations of licensed wholesalers and of their relations with the industry members is subject to comprehensive regulation by the states in which they operate. Invalidation of affirmation would in all likelihood have an effect on other related areas of state regulation of alcoholic beverages, threatening fundamental changes in the structure, competitive tenor and governmental regulation of the alcoholic beverage industry in this country and consequent uncertainty, dislocation and economic harm.

Amicus believes that in this brief it will present matters germane to the Court's decision that may not be treated or may not be developed fully by the appellee because of their differing, although wholly compatible, positions and perspectives.

³See Brief for Appellant, p. 5, n. 4, and WSWA Brief as *Amicus*, *infra*, p. 3, n. 1.

⁴See WSWA Brief as *Amicus*, *infra*, p. 3, n. 2.

For the foregoing reasons, *amicus* respectfully requests leave to file the accompanying *amicus* brief.

Respectfully submitted,

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**Brief of *Amicus Curiae* Wine and Spirits Wholesalers of
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————— ● —————
Wine and Spirits Wholesalers of America, Inc.
("WSWA") hereby appears *amicus curiae* pursuant to the
motion filed herewith.

Interest of the Amicus

The interest of WSWA in this matter has been set forth in the accompanying motion for leave to file brief as *amicus curiae*.

Statement of the Case

This appeal concerns the "posting" and "affirmation" provisions of section 101-b of the New York Alcoholic Beverage Control Law (McKinney 1970 and Supp. 1984) (hereinafter the "ABC Law") and, particularly, the constitutionality of the affirmative provisions.

In general terms, the posting provision of the ABC Law requires every supplier (*e.g.*, manufacturer, distiller, importer), proposing to sell liquor to New York licensed wholesalers to file or "post" monthly with the State Liquor Authority a schedule of its prices to wholesalers. A supplier must abide by its posted prices on a non-discriminatory basis for the month for which filed, except for good cause shown. ABC Law §101-b, subds. 3, 4. The affirmation provision requires each supplier to file a sworn statement that "the bottle and case price of liquor to wholesalers" filed by the supplier with the State Liquor Authority represents a price "no higher than the lowest price at which such item of liquor will be sold" by the supplier to any wholesaler or monopoly state in the United States during the same calendar month. The two provisions together, along with other provisions of the ABC Law, further New York's policy to prevent unequal treatment of wholesalers and retailers and to assure New York consumers will not pay unjustifiably higher prices than consumers in other states. ABC Law §§2, 101-b, subds. 1, 2; 1964 New York Laws ch. 531, §8. These practices are

used by many open states as the functional equivalent of the contractual terms demanded by the control states.

The constitutionality of the New York affirmation statute, as it was originally enacted in 1964, was addressed by the Court in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 16 N.Y.2d 47 (1965), *aff'd*, 384 U.S. 35 (1966). There, the Court concluded that seeking the lowest price possible was permissible, and found that the record did not demonstrate the existence of sufficiently substantial extra-territorial effects of the statute to render it unconstitutional.

Subsequent to that decision, at least 18 other open states have enacted similar provisions.¹ At least 11 states also have a posting requirement.² In 1967, in partial response to the concerns of suppliers that the provisions of the 1964 enactment requiring comparisons of New York prices with

¹Ariz. Rev. Stat. Ann. §4-253 (Supp. 1985); Cal. Bus. and Prof. Code §23673 (Deering Supp. 1985); Conn. Gen. Stat. Ann. §30-63(b) (West 1977 & Supp. 1985); Del. Code Ann. tit. 4 §508(a) (1985); F.S.A. §565.15 (West Supp. 1985); Ga. Admin. Comp. ch. 560-2-3 §47 (1982); Hawaii Rev. Stat. §281-123(1) (Supp. 1984); Kan. Stat. Ann. §41-1112 (1981); La. Rev. Stat. Ann. §26:370 (1975); Md. Bus. Reg. Code Ann. §109(c-1) (1981); Mass. Ann. Laws ch. 138 §25D(b) (Michie/Law Coop. 1981); Minn. Stat. Ann. §340.114 (West Supp. 1985); Neb. Rev. Stat. §53-170.02 (1984); N.J. Admin. Code tit. 13 §13:2-74.5 (1978 & Supp. 1985); Oklahoma Stat. Ann. tit. 37 §536.1 (Supp. 1985); R.I. Gen. Laws §3-6-14.1 (1956); S.D. Codified Laws Ann. §35-4-94 (Supp. 1985); Tenn. Code Ann. §57-3-202 (1980). Appellant has also identified Nevada and South Carolina as affirmation states but *Amicus* has not been able to locate express statutory provisions in the laws of those states.

²Ariz. Rev. Stat. Ann. §4-252 (Supp. 1985); Conn. Gen. Stat. Ann. §30-63 (West 1977 & Supp. 1985); Del. Code Ann. tit. 4 §508(d) (1985); F.S.A. §565.15 (West Supp. 1985); Hawaii Rev. Stat. §281-123(2) (Supp. 1984); Kan. Stat. Ann. §41-1101(1) (1981); Md. Bus. Reg. Code Ann. §109(c) (1981); Mass. Ann. Laws, ch. 135 §25B (1981); Minn. Stat. Ann. §340.983 (1972 & Supp. 1985); Neb. Rev. Stat. §53-170.03 (1984); N.M. Stat. Ann. §60-8A-12 (1978 & Supp. 1985).

prior prices elsewhere were unadministrable, New York amended its statute to require affirmations based on comparisons of contemporaneous prices. Governor's Bill Jacket pertaining to 1967 N.Y. Laws, ch. 798.

Brown-Forman challenged the constitutionality of New York's affirmation statute in connection with a license revocation proceeding brought by the State Liquor Authority to prevent Brown-Forman from selling in New York at prices higher than those charged elsewhere by Brown-Forman, taking into account promotional allowances Brown-Forman made in other states. Brown-Forman's claims were rejected by the New York Court of Appeals. J.S. App. 1a. Brown-Forman then appealed to this Court to determine the validity of the statute, both facially and as applied. This Court noted probable jurisdiction only with respect to Brown-Forman's facial challenge.

Summary of Argument

To determine the validity of any evenhanded state regulation in relation to the Commerce Clause of the United States Constitution, one must balance the nature of the local interest served and the degree to which it is served by the challenged regulation against the effects of that regulation on interstate commerce. *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375 (1983); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

In this appeal involving, as it does, a state effort to regulate the sale of alcoholic beverages for use therein, the Twenty-first Amendment to the Constitution is, of course, a necessary touchstone affording greater weight in the balance to the state interest than might be afforded in the ordinary case. *Capital Cities Cable, Inc. v. Crisp*, ____ U.S. ____, 104 S.Ct. 2694 (1984); *Battipaglia v. New York*

State Liquor Authority, 745 F.2d 166 (2d Cir. 1984) (Friendly, J.), *cert. denied*, ____ U.S. ____, 105 S.Ct. 1393 (1985).

When Brown-Forman's facial challenge to the constitutionality of New York's affirmation statute is assessed in that analytical framework, it will be seen that Brown-Forman has failed to sustain its burden of demonstrating that the challenged statute creates any burden on interstate commerce, much less a constitutionally unacceptable one.

The New York affirmation statute evenhandedly and effectively furthers the legitimate local interests of regulating the distribution and sale of alcoholic beverages within its borders and preventing unjustifiable price discrimination. See *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966), which sustained the constitutionality of the functionally equivalent predecessor to the statute challenged here.

On the other side of the balance, New York's affirmation statute neither seeks nor has it been demonstrated to have any direct effect on prices of liquor in other states, or to protect or discriminate in favor of in-state economic interests. In contrast to the statute at issue in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), the New York affirmation statute does not attempt to regulate interstate commerce; only conduct within New York State can result in a violation. And, in contrast to the blatantly preferential statute at issue in *Bacchus Imports, Ltd. v. Dias*, ____ U.S. ____, 104 S.Ct. 3049 (1984), the New York statute does not classify the regulated entities on their products on an in-state versus out-of-state basis.

The burdens on interstate commerce claimed by Brown-Forman to be created by New York's affirmation statute are unsupported by the record and conjectural at best.

Even if Brown-Forman's claims are true, however, the alleged burdens are minimal given the relatively brief times over which price movements are arguably restricted and the highly structured character of the market created by the existence of the monopoly states and by the plethora of unquestionable regulations imposed on the alcoholic beverage industry by the open states.

Argument

Consideration of the constitutionality of any state law regulating intoxicating liquor must begin with the Twenty-first Amendment to the Constitution. *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966).¹ Only then can the degree, if any, to which the regulation encroaches upon the Commerce Clause's limits on New York State's capacity to affect interstate commerce be weighed.

Even where alcoholic beverages and the Twenty-first Amendment are not involved, the constitutionality of a state regulation affecting interstate commerce cannot be determined by the application of a simple litmus test, but rather will depend on a balancing of competing interests, federal and state, in which the state will necessarily have broader latitude for regulatory action than under a more mechanical test. *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 389-93 (1983). As this Court stated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1979):

¹Section 2 of that Amendment provides: "The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Where [a] statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

397 U.S. at 142.

When, as here, alcoholic beverages and the Twenty-first Amendment are involved, greater weight will be accorded the state regulation. *Battipaglia v. New York State Liquor Authority*, 745 F.2d 166 (2d Cir. 1984), cert. den., ___ U.S. ___, 105 S.Ct. 1393 (1985). If the state regulation is in direct and substantial furtherance of the powers reserved to the states by the Twenty-first Amendment, again as it is here, it will prevail even if it conflicts with express federal policies. *Capital Cities Cable, Inc. v. Crisp*, ___ U.S. ___, 104 S.Ct. 2694, 2708 (1984). What is required in every case is a "pragmatic effort to harmonize the state and federal powers" concerned. *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 109 (1980). See also *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964).

To borrow the words of this Court in *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, *supra*: "Applying the *Bruce Church* test to this case is relatively simple. The most serious concern identified in

Bruce Church—economic protectionism—is not implicated here [citation omitted]. Moreover, state regulation of . . . [in-state prices for alcoholic beverages] is well within the scope of ‘legitimate local public interests’ . . .” 461 U.S. at 394. See also *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966).

I.

THE NEW YORK AFFIRMATION STATUTE ON ITS FACE IMPOSES NO SUBSTANTIAL BURDEN ON INTERSTATE COMMERCE.

Notwithstanding the necessity for reconciling these two sources of power within the Constitution, *Brown-Forman* initially challenges the posting and affirmation⁴ provisions of the ABC Law⁵ without reference to or mention of the Twenty-first Amendment. *Brown-Forman* apparently seeks to avoid the implications of that Amendment by characterizing the New York provisions as either a direct extra-territorial regulation by New York of liquor prices in other states or economic protectionism or discrimination.

A. The Statute Regulates Transactions in New York and Has No Direct Extraterritorial Effect

The extent to which *Brown-Forman* mischaracterizes the territorial scope of the New York statute is

⁴ABC Law §101-b, subds. 3, 4 (McKinney’s 1970 and Supp. 1984).

⁵The ABC Law comprehensively regulates the manufacture, sale and distribution of alcoholic beverages within the State of New York. Those who would traffic in alcoholic beverages in New York are required to be licensed by that State and are subject to a broad range of interrelated statutory requirements and proscriptions.

demonstrated by its reliance on *Edgar v. MITE Corp.*, 457 U.S. 624 (1982). There the Court invalidated an Illinois statute that imposed conditions on the issuance of tender offers for any corporation, anywhere, that had at least 10 percent of its stated capital and paid-in surplus represented in Illinois or was otherwise related to that state. According to Justice White, “the most obvious burden the Illinois Act imposes on interstate commerce arises from the statute’s previously described nation-wide reach which purports to give Illinois the power to determine whether a tender offer may proceed anywhere.” 457 U.S. at 643.

Unlike the Illinois tender offer statute, however, the New York affirmation statute on its face regulates sales in New York only. The statute proscribes sales to wholesalers in New York at prices that deviate from the seller’s posted New York price or that are at a price that exceeds that contemporaneously charged by the seller in another state. ABC Law §101-b, subds. 3, 4 (McKinney’s 1970 and Supp. 1984).⁶ Sales in other jurisdictions are relevant only insofar as they serve as a reference point for determining in-state compliance. The extent, if any, to which the New York provisions may bear on a supplier’s decision either as to initial pricing or as to whether to make a subsequent, mid-month price change in any other jurisdiction is wholly

⁶Thus New York accomplishes by statute what the “control” or “monopoly” states ensure by contract: a supplier must generally warrant to each monopoly state with which it does business that the item price to that state is no higher than the price that will be charged anywhere else. Not insignificantly, suppliers are also required, perhaps typically, to warrant that quoted prices will remain in effect for a minimum of 90 days. A decision to lower a price in another state could constitute a breach of the monopoly state warranties just as such a lowering would constitute a violation of the New York statute if sales in New York at the previous, higher price were thereafter consummated.

conjectural. If the New York provisions were to have any bearing, either in general or in a particular case, however, that would occur not by direct operation of the statute, but by virtue of the supplier's own voluntary decision respecting the importance of doing business in New York.⁷

The other decisions upon which Brown-Forman relies in its effort to characterize the New York statute as having extra-territorial effect are similarly inapposite: each of them addresses not the direct "extra-territorial" operation of a state statute, but rather the effort of a state to regulate or control interstate commerce itself, without regard to the situs of the control.

In *Public Utilities Commission v. Attleboro Steam and Electric Co.*, 273 U.S. 83 (1927), the Court addressed a Rhode Island statute that sought to establish electric utility

⁷As stated, these potential effects are wholly speculative. Brown-Forman has not introduced any market data or information concerning the manner in which pricing decisions are made and implemented, but rather has offered only unsupported assertions presenting its perceptions of the nature of the national liquor market. (In that regard, it should be noted that Brown-Forman implicitly concedes that the practical effects of an affirmation statute are the same irrespective of whether the statute is "prospective" or whether it is "retrospective.") For example, the record contains no evidence that Brown-Forman, or any other supplier, makes mid-month price changes in either affirmation or non-affirmation states. We suggest parenthetically that such changes, if any, are likely to be the exception rather than the rule because of the restrictions of price posting statutes which typically require the adherence to posted prices for a minimum period of a calendar month. See, e.g., ABC Law §101-b, subd. 4 (McKinney Supp. 1984). The validity of such statutes has been upheld. See *Battipaglia v. New York State Liquor Authority*, 745 F.2d 166 (2d Cir. 1984), cert. denied, ____ U.S. ____, 105 S.Ct. 1393 (1985).

rates to be charged in interstate commerce.⁸ Similarly, in *Shafer v. Farmer's Grain Co.*, 268 U.S. 189 (1925), the Court struck down a North Dakota Grain Grading Act that sought to impose standards on the processing, marketing and pricing of grain over ninety percent of which was destined for interstate shipment. The Court held that in "subjecting the buying for interstate shipment to the conditions and measures of control as shown, the Act directly interferes with and burdens interstate commerce, and is an attempt by the State to prescribe rules under which an important part of such commerce can be conducted." 268 U.S. at 201. As the Court later observed in *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 537 (1949), the regulation in *Shafer* was "of interstate commerce itself."

Brown-Forman makes much of these decisions, focusing on the words "direct" and "indirect" as though they have talismanic significance that might simplify the task of deciding concrete cases and avoiding any consideration of the extent to which the Twenty-first Amendment bears upon the principles guiding the Court in those decisions. Whatever the value of such labels, the hazards of applying them rigidly and without reference to the interests protected by the Twenty-first Amendment are demonstrated by Brown-Forman's reliance on *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935).

There the Court invalidated a New York statute that provided that no in-state sale of milk produced outside that state could occur unless the price paid to the out of

⁸In any event, the fairly mechanical test set out in *Attleboro* has been abandoned in favor of the balance of interests test developed since then. *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375 (1983).

state milk producer was comparable to prices established by the State of New York for purchases from in-state producers. The Court rebuffed New York's attempt to do indirectly what the parties to the case conceded a state could not do directly—prohibit the introduction into that state of wholesome quality milk acquired in another state. The challenged New York statute, the Court found, would “set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported.” 294 U.S. at 521.

First, of course, New York does not establish prices for the sale of liquor but merely seeks to ensure that suppliers adhere to the prices they have imposed on themselves. Wholly apart from that distinction, however, New York surely *does* have the power under the Twenty-first Amendment to prohibit the introduction into that state of all liquor.⁹

The conclusion of the Second Circuit in *United States Brewers Association v. Healy*, 695 F.2d 275 (2d Cir. 1982), *aff'd mem.* 464 U.S. 909 (1983), that a Connecticut beer price affirmation statute “controlled” prices in other states is not persuasive, nor is the holding of that case, which concerned a statute significantly different from the New York statute, relevant to the issue before the Court.

⁹Brown-Forman's reliance on *Seelig* calls forth Judge Friendly's recent caution that “for those of us who were present ‘at the creation’ of the Twenty-first Amendment, there is an aura of unreality in the assertion that we must examine the validity of New York's Alcoholic Beverage Control Law just as we would examine the constitutionality of a state statute governing the sale of gasoline.” *Battipaglia v. New York State Liquor Authority*, 745 F.2d 166, 168 (2d Cir. 1984); *cert. denied*, ___ U.S. ___, 105 S.Ct. 1393 (1985).

The Second Circuit in *Healy* apparently construed the Connecticut statute (which the district court had found was intended to increase tax revenues for the State of Connecticut by fostering sales of beer in that state) flatly to prohibit the sale of any item in an adjoining state at a price lower than the previously posted price for that item in Connecticut. 692 F.2d at 276. The New York statute (which is not intended to promote sales of liquor in-state) has never been construed, however, to prohibit such a deviation from the posted price elsewhere; it merely prohibits the higher-price sale in New York. There is no suggestion that an out-of-state sale that differs from the price posted in New York, standing alone, would give rise to a statutory violation unless and until a sale occurs in New York at the higher price. Nor would such a construction of the New York statute be reasonable in light of its stated purpose.¹⁰

A supplier may always suspend sales of an item in New York if it finds it necessary or advantageous to reduce its

¹⁰In connection with an earlier challenge to the New York posting and affirmation statute, the New York Court of Appeals held: “The statute is concerned with New York practices and, if the sales in other States have no relevancy to New York enforcement, the statute permits the Liquor Authority for good cause to waive the general prohibition against sales to wholesalers in the absence of such schedules. It would be reasonable to expect that the statute would be administered consistently with its sole purpose to regulate the intrastate sale of liquor.” *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 16 N.Y.2d 47, 59 (1965). That interpretation of legislative purpose and construction of the statute was accepted by the Court in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 51 (1966). The legislative purpose was not changed by the 1967 amendment, which at the request of distillers sought *inter alia* to eliminate the two month lag within which a price outside of New York was to affect the New York price by making the timing requirement similar to that imposed upon suppliers by the control states. See New York State Department of Law Memorandum, re: S. 4569, April 21, 1967, in Governor's Bill Jacket pertaining to 1967 New York Laws, ch. 798.

prices elsewhere. In the alternative, the supplier may seek to adjust its New York price to correspond to the out-of-state price. Unlike the Connecticut statute at issue in *Healy*, the New York provision permits a supplier to amend the price for an item—for good cause shown and for reasons not inconsistent with the purposes of the statute—upon application to the State Liquor Authority. A purpose of the posting and affirmation provisions is to assure that consumers in New York are not discriminated against by suppliers, by being required to pay unjustifiably higher prices than prevail elsewhere. 1964 N.Y. Laws ch. 531, §8; *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 16 N.Y.2d 47 (1965), *aff'd* 384 U.S. 35 (1966). It is, thus, reasonable to conclude that a lower price in another state would constitute good cause for a reduced price in New York within the meaning of the statute. Indeed, the statute has been so construed. See *Joseph E. Seagram and Sons, Inc. v. Gazzara*, 610 F.Supp. 673 (S.D.N.Y. 1985).

B. The Statute Is Neither Discriminatory Nor Protectionist

In *Baldwin v. G.A.F. Seelig*, 294 U.S. 511 (1935), this Court formulated the classic definition of economic protectionist legislation that constitutes a violation of the Commerce Clause:

Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin.

294 U.S. at 527. Brown-Forman impermissibly seeks to expand that definition to extend the concept of prohibited protectionism into areas that this Court has previously recognized as valid objects of state regulation.

The definition of protectionism expressed in *Seelig* requires that, to constitute a violation of the Commerce Clause, a state statute must classify the regulated entities or their products into two groups: those originating in the state which adopted the statute and those originating in other states. Moreover, the former group must be granted some explicit advantage at the expense of the latter. As stated in *Bacchus Imports, Ltd. v. Dias*, ___ U.S. ___, 104 S.Ct. 3049 (1984), "a state may not tax interstate transactions in order to favor local businesses over out-of-state businesses." 104 S.Ct. at 3056.

Brown-Forman does not suggest that the New York statute classifies the objects of its regulation on an in-state as opposed to an out-of-state basis. Indeed, the statute, on its face, does nothing of the sort. In disregard of this Court's instruction that Brown-Forman present only a facial challenge to the validity of this statute and without any support in the record, however, Brown-Forman posits that the New York statute in effect allows New York retailers a discriminatory discount not available to retailers in other states. Brown-Forman argues that, by requiring suppliers doing business in New York to sell there at the lowest price charged nationwide (with allowance for differentials in taxes and transportation costs), the statute causes the New York price to fall below the price level that free competition would otherwise dictate in New York. This imaginative argument suffers from three major defects.

First, free competition in the alcoholic beverage industry simply does not prevail in any state of the Union, so that it is meaningless to talk about interference with the free market price in New York as if a pristine free market price prevailed in all other states. The Twenty-first Amendment constitutionally allowed the abrogation of the free market in alcoholic beverages. Moreover, as this Court observed in its decision in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966), the presence of the so-called monopoly states has resulted in burdens on free competition more onerous than anything accomplished by a simple posting and affirmation statute. 384 U.S. at 45.

Second, even in the absence of the Twenty-first Amendment, the Commerce Clause does not mandate free competition. A state has "every right to protect its residents' pocketbooks" *Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978). Regulations designed to assure "a fair price and a responsible purchaser" are assumed to be valid. *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 530 (1949). All regulatory laws to some extent upset the free market, but that alone does not render them invalid. As stated in *Kassel v. Consolidated Freightways Corporation*, 450 U.S. 662 (1981):

The Commerce Clause does not, of course, invalidate all state restrictions on commerce. It has long been recognized that, "in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it." *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 (1945). The extent of

permissible state regulation is not always easy to measure. It may be said with confidence, however, that a State's power to regulate commerce is never greater than in matters traditionally of local concern.

450 U.S. at 669-670. *A fortiori*, in matters involving alcoholic beverages, matters not merely "traditionally" but also constitutionally of local concern, it is not enough simply to state that a statute interferes with "free competition" to invalidate it.

Brown-Forman's argument is particularly strained when applied to the present statute, which actually furthers Commerce Clause principles. In upholding the New York State statute in the face of a contemporaneous challenge to its validity, Judge Sand of the District Court pointed out:

By virtue of the unique authority which the Twenty-First Amendment grants to the states to control the importation and distribution of alcoholic beverages, state monopolies are permissible where they would not be otherwise. A side effect of that authority is a market in which monopoly states can exert disproportionate leverage. *As a result, price affirmation statutes for alcoholic beverages can be justified (as they cannot be for other commodities) as a reasonable means of responding to the market irregularities created by the Twenty-First Amendment, and we believe it is in accord with the purposes of the Amendment to interpret it as authorizing such a response.*

Joseph E. Seagram & Sons v. Gazzara, 610 F. Supp. 673, 681 (S.D.N.Y. 1985) (emphasis added), *appeal pending*,

No. 85-75 47 (2d Cir.). The response of other states to market conditions is also instructive. In *Kassel v. Consolidated Freightways Corporation*, 450 U.S. 662 (1981), an Iowa statute's incompatibility with rules of the road in other states was cited as a reason for striking down the statute's prohibition on 65-foot double-trailer trucks in-state. 450 U.S. at 671. Here, in contrast, the statute conforms with the regulatory climate prevailing throughout the nation.

Third, the facts in the present case do not bear even the remotest resemblance to the facts in those cases in which this Court has struck down statutes as "economic protectionist." The New York statute applies equally to all liquor sold in New York, no matter what its point of origin. The invalid statutes, in contrast, all sought to preserve special advantages for in-state interests or to favor the commerce of one state over another by making distinctions related to point of origin.

For example, in *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), the first case in which a law was overturned on the basis of discriminatory effect alone, the invalid statute by its very terms barred out-of-state waste from entering the state. Although the statute's purpose was to protect the New Jersey environment, it could not constitutionally do so by explicitly distinguishing between in-state and out-of-state waste, allowing the former and rejecting the latter.¹¹

¹¹*Accord, e.g., New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982) (local residents given preferred or exclusive access to power produced locally); *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980) (statutory scheme prohibiting investment advisory services by bank holding companies with principal offices out-of-state); *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333 (1977) (North Carolina statute imposing additional costs on Washington, but not on North Carolina, apple shippers); *Foster-Fountain Packing Company v. Haydel*, 278 U.S. 1 (1928) (industry forced to remain in-state to preserve local jobs.)

The New York affirmation statute neither contains a protectionist classification nor confers a benefit upon local industry. An out-of-state supplier is required to abide by its posted prices in New York for a given month, except for good cause shown, just as a New York supplier is bound to maintain its posted prices. They are subject to the same restriction: each must either seek State Liquor Authority approval for a change in price or suspend New York sales if unwilling or unable to abide by a posted price for the prescribed period. It would be extraordinarily odd to invalidate as protectionist a New York statute which could have the effect of causing a New York liquor supplier to cease its New York sales while continuing distribution out-of-state. Thus, this statute applies equally to all; it does not discriminate against any out-of-state interests.¹²

In contradistinction to the statutes invalidated as protectionist, the New York statute closely resembles in effect the statutory scheme upheld in *Minnesota v. Clover Leaf Creamery Company*, 449 U.S. 456 (1981). The Minnesota statute at issue in *Clover Leaf* banned the in-state sale of nonreturnable plastic milk containers while permitting the use of similar cartons made of paperboard. Although the statute was enacted with the express legislative purpose of conserving natural resources and relieving waste management problems, the plastic carton industry alleged and the Minnesota Supreme Court agreed that "contrary to the statement of purpose in section I the 'actual basis' for the Act 'was to promote the economic interests of certain segments of the local dairy and pulp wood industries at the

¹²The New York statute contains no classification directed against out-of-state consumers. It cannot be said that simply by enacting legislation to benefit its own residents, New York *ipso facto* discriminates against out-of-state residents. *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966).

expense of the economic interests of other segments of the dairy industry and the plastics industry.' " 449 U.S. at 460 (quoting the opinion of the Minnesota State District Court). This Court reversed the decisions of the Minnesota courts and sustained the validity of the statute. While recognizing that Minnesota pulp wood producers might incidentally benefit from the act, the Court saw no evidence that the statute classified the affected parties on an in-state versus an out-of-state basis. The six-member majority (with one justice not participating) concluded as follows:

Even granting that the out-of-state plastics industry is burdened relatively more heavily than the Minnesota pulpwood industry, we find that this burden is not "clearly excessive" in light of the substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems, which we have already reviewed in the context of equal protection analysis.

449 U.S. at 473. *Accord*, *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-128 (1978) (because the Commerce Clause "protects the interstate market, not particular interstate firms," state was permitted to bar all producers and refiners of petroleum products from retailing gasoline in the state even though all the producers and refiners doing business in Maryland incidentally came from outside the state).

This Court's decision in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966), further compels the conclusion that the New York state statute is valid. As previously mentioned, *supra* at 13, n. 10, the New York

statute found valid in *Hostetter* differs from its more recent version only in the timing of affirmation and posting. The timing issues plainly do not affect the question whether the statute groups regulated entities or products on the basis of their state of origin.¹³ This inquiry is the critical one for the purpose of evaluating the claim that the statute amounts to "economic protectionism." Because the two statutes do not differ in the equality of their treatment of both New York and non-New York suppliers, the Court's general conclusion in *Hostetter* that a price affirmation and posting statute is in principle non-discriminatory and not protectionist should stand:

The mere fact that §9 is geared to appellants' pricing policies in other States is not sufficient to invalidate the statute. As part of its regulatory scheme for the sale of liquor, *New York may constitutionally insist that liquor prices to domestic*

¹³It will be recalled that Brown-Forman does not base its "economic protectionism" argument on the timing of affirmation and posting. Rather, Brown-Forman contends principally that the mere fact of affirmation, which allegedly fixes a lower than market price for liquor sold in New York State, constitutes a purportedly illegitimate interference with "free competition," such as it exists in the liquor industry. In the words of Brown-Forman "[a]ffirmation assures New York economic interests the lowest prices anywhere, whether justified by the character of the competition there [i.e., in New York] or not." Brief for Appellant, at p. 25. This then is obviously an attack on affirmation as protectionist *per se* regardless of the timing of such affirmation. (Brown-Forman's argument that the statute, as a result of the timing of affirmation, directly burdens interstate commerce as manifest in other states is separate from the discrimination question and has previously been discussed.) But, the minimum price floors in other states alleged by Brown-Forman would neither promote New York products at home or in other states (they are subject to the same "price floor"), nor benefit New York consumers (Brown-Forman has alleged that the statute prevents a *lowering* of prices thus actually acting to the detriment of instate consumers).

wholesalers and retailers be as low as prices offered elsewhere in the country. The serious discriminatory effects of §9 alleged by appellants on their business outside New York are largely matters of conjecture.

384 U.S. at 43 (emphasis added). The Court specifically approved the State Legislature's purpose "to eliminate 'discrimination against and disadvantage of consumers' in the State," 384 U.S. at 47, and pointed out that in cases involving "liquor destined for use, distribution, or consumption in the State of New York . . . the Twenty-First Amendment demands wide latitude for regulation by the State." 384 U.S. at 42.¹⁴

¹⁴The decision in *United States Brewers Association v. Healy*, 692 F.2d 275 (2nd Cir. 1982), *aff'd mem.*, 464 U.S. 909 (1983), is irrelevant to the protectionism/discrimination issue. The Second Circuit did not reach this issue because it invalidated the Connecticut affirmation statute on the basis of its perceived direct effect on interstate commerce. The court found that Connecticut "seeks to regulate prices not just in Connecticut but in its surrounding states as well." 692 F.2d at 282. The court did not find that the Connecticut statute effectively constituted protection for beer produced in Connecticut, nor did it even discuss anything remotely resembling Brown-Forman's argument that the Commerce Clause somehow compels a free market price both in-state and out-of-state. See *United States Brewers Association v. Rodriguez*, 104 S.Ct. 1581, 1582 (1984) (Stevens, J., concurring in dismissal of appeal) ("Our recent decision in *Healy* . . . does not undermine . . . *Joseph E. Seagram & Sons, Inc. v. Hostetter* . . .").

II.

THE STATUTE IS AN INTEGRAL PART OF A COMPREHENSIVE SCHEME GOVERNING THE SALE OF ALCOHOLIC BEVERAGES IN NEW YORK AND SHOULD NOT BE SET ASIDE ON THE BASIS OF SPECULATIVE EFFECTS ON INTERSTATE COMMERCE.

As has been demonstrated, the New York statute, on its face, does not dictate prices that may be charged in any other state and is not protectionist or discriminatory. The facial reach of the statute is confined to the in-state regulation of the sale of alcoholic beverages, an area reserved to the states by the Twenty-first Amendment. Accordingly, the statute cannot be invalidated without the careful and pragmatic weighing of interests that the Court has heretofore required. See *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 109-110 (1980).

As noted previously, the Court has long recognized that "in the absence of conflicting legislation by Congress, there is a residuum of power in the states to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it." *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 669 (1981), quoting *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 (1945). Moreover, when the interests of the Twenty-first Amendment are implicated, "a State is totally unconfined by traditional Commerce Clause restrictions when it restricts the importation of intoxicants destined for use, distribution or consumption within its borders." *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966) (quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 337 U.S. 324, 330 (1964)).

The Court has held recently that when a statute patently discriminates against interstate commerce, at least some relationship between the challenged statute and the Twenty-first Amendment is necessary to overcome any countervailing interests of the Commerce Clause. Thus, in *Bacchus Imports, Ltd. v. Dias*, ____ U.S. ____, 104 S.Ct. 3049 (1984), a protectionist and discriminatory tax exemption for certain spirits produced by local Hawaiian industry was held invalid, because the promotion of local industry had no relation to any concern of the Twenty-first Amendment.

The New York statute is of an entirely different character. First, as has been demonstrated in Point I of this brief, the New York affirmation and posting statute is neither discriminatory nor protectionist. Moreover, the New York affirmation and posting requirements are an integral part of a comprehensive scheme for the regulation of the sale and distribution of alcoholic beverages in that state, regulatory activity well within the ambit of the powers reserved to the states by the Twenty-first Amendment. Accordingly, as the Court held in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966), a state may constitutionally insist that liquor prices to domestic wholesalers be as low as prices offered elsewhere in the country.¹³ 384 U.S. at 43. This view was recently affirmed by the Court in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97

¹³Indeed, as the Court noted in *Seagram v. Hostetter*, a common practice for the so-called monopoly states is to require distillers to warrant that the prices charged that state are no higher than the prices that will be charged in other states. 384 U.S. at 43-44 and n. 14. New York seeks to accomplish nothing further through its posting and affirmation statute than do the monopoly states in their exercise of their Twenty-first Amendment power to control completely all aspects of liquor pricing and regulation.

(1979), in which the Court once again stated that "[t]he Twenty-first Amendment grants the states virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system" within their borders. 445 U.S. at 110.

Since it is beyond dispute that the purely in-state effects of any posting and affirmation system are immune from challenge under the Commerce Clause, Brown-Forman is relegated to challenging the New York statute on the basis of its perceived effects in other states. As has been previously demonstrated, however, whatever effects there may be are wholly incidental to both the purposes and the operation of the New York statute.

In an effort to demonstrate the purported magnitude of these effects, Brown-Forman offers pages of bold assertions, without reference to any facts or record, concerning its perception of the nature of the national liquor market and the interlocking effect of the New York affirmation requirements which are somehow "compounded" by affirmation and warranty provisions in other states. Thus, not only does Brown-Forman seek to invalidate the New York statute on the basis of conjecture, it does so on the basis of practical effects it implicitly concedes are no different from the effects produced by any other affirmation and posting statute or by the contractual warranty provisions mandated by the monopoly states. See Brief for Appellant, at 30 and n. 14.

As this Court has held, however, conjecture is not a sufficient basis to invalidate an affirmation statute. *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35 (1966).

CONCLUSION.

For the reasons stated, the judgment of the New York Court of Appeals should be affirmed.

January 10, 1986

Respectfully submitted,

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AMICUS CURIAE

BRIEF

MOTION FILED
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No. 84-2030

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

BROWN-FORMAN DISTILLERS CORPORATION,
Appellant,

v.

STATE OF NEW YORK LIQUOR AUTHORITY,
Appellee.

On Appeal from the Court of Appeals of New York

**MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF
THE NATIONAL CONFERENCE
OF STATE LEGISLATURES,
NATIONAL ASSOCIATION OF COUNTIES,
NATIONAL GOVERNORS' ASSOCIATION,
INTERNATIONAL CITY MANAGEMENT ASSOCIATION,
COUNCIL OF STATE GOVERNMENTS,
NATIONAL LEAGUE OF CITIES, AND
U.S. CONFERENCE OF MAYORS
AS AMICI CURIAE IN SUPPORT OF APPELLEE**

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QUESTIONS PRESENTED

1. Whether, in light of the Twenty-first Amendment, a state statute requiring distillers to affirm that the price at which they will sell in the state is no higher than the price currently being offered elsewhere in the country is subject to the restrictions of the dormant Commerce Clause.

2. Whether, assuming that state liquor regulation is subject to the dormant Commerce Clause, it should be invalidated merely on the basis that it burdens interstate commerce, when it does not discriminate against interstate commerce.

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NATIONAL LEAGUE OF CITIES, AND
U.S. CONFERENCE OF MAYORS
AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

Pursuant to Rule 36 of the Rules of this Court, *amici* respectfully move this Court for leave to file the attached brief *amici curiae* in support of appellee.¹

¹ Appellee has consented to the filing of this brief. Appellant has not.

The *amici* are organizations whose members include state, county, and municipal governments and their officials located throughout the United States. *Amici* and their members, therefore, have a vital interest in the legal issues that affect the powers and responsibilities of state and local government.

The New York Court of Appeals correctly concluded that New York's affirmation provisions are constitutional. This holding is of great importance to *amici* and their members because twenty states require affirmation by statute and eighteen others, in which the state itself participates in the sale of liquor, require affirmation by contract.² Among *amici's* members are those public officials specifically responsible for regulating liquor within each state. This case, therefore, directly concerns *amici* because reversal of the decision would dramatically alter the regulation of liquor in these states.

Amici and their members are also generally responsible for state and local regulation regularly challenged under the Commerce Clause, and the standard by which such regulation is tested is therefore similarly of crucial importance to *amici*. The New York court held that the state's affirmation provisions do not violate the Commerce Clause because there was no purpose or effect to discriminate against out-of-state businesses. *Amici* submit that no Commerce Clause violation exists in the absence of discrimination against interstate commerce, and that even discriminatory regulation may be valid under the Twenty-first Amendment.

Amici submit that the decision of the New York Court of Appeals is correct under the Twenty-first Amendment and the Commerce Clause. Because a contrary decision

² The Commonwealth of Pennsylvania, which currently requires affirmation by contract, does not join in this Motion or the accompanying Brief.

will have a direct and immediate adverse effect on matter of compelling importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.

Respectfully submitted,

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January 13, 1986

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-2030

BROWN-FORMAN DISTILLERS CORPORATION,
Appellant,

v.

STATE OF NEW YORK LIQUOR AUTHORITY,
Appellee.

On Appeal from the Court of Appeals of New York

**BRIEF OF
THE NATIONAL CONFERENCE
OF STATE LEGISLATURES,
NATIONAL ASSOCIATION OF COUNTIES,
NATIONAL GOVERNORS' ASSOCIATION,
INTERNATIONAL CITY MANAGEMENT ASSOCIATION,
COUNCIL OF STATE GOVERNMENTS,
NATIONAL LEAGUE OF CITIES, AND
U.S. CONFERENCE OF MAYORS
AS *AMICI CURIAE* IN SUPPORT OF APPELLEE**

INTEREST OF *AMICI CURIAE*

The interest of the *amici* is detailed in the motion accompanying this brief.

STATEMENT OF THE CASE

Congress and this Court have long recognized that the states' interest in regulating intoxicating liquor within their borders is of paramount importance. Even before the ratification of the Eighteenth Amendment, this Court recognized that states had broad authority to regulate the importation and sale of liquor within their borders free from the restrictions of the dormant Commerce Clause.¹ See *License Cases*, 46 U.S. (5 How.) 504 (1847). When the continued vitality of the *License Cases* was questioned in the late 1800's, Congress, acting pursuant to its power under the Commerce Clause, enacted the Wilson Act² and the Webb-Kenyon Act³ to make clear that the restrictions

¹ The Commerce Clause acts as both an affirmative grant of authority to Congress and an implied limitation on the power of the states, commonly referred to as the "dormant Commerce Clause." See *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 652 (1981); *Great A&P Tea Co., Inc. v. Cottrell*, 424 U.S. 366, 370-71 (1976). By affirmative command, Congress may lift the Clause's implied restraint against state legislation that burdens interstate commerce. See *Northeast Bancorp, Inc. v. Board of Governors*, — U.S. —, 105 S.Ct. 2545, 2554 (1985); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339-40 (1982); *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980).

² The Wilson Act, 27 U.S.C. § 121, 26 Stat. 313 (1890), provides in pertinent part: "All . . . intoxicating liquors or liquids transported into any State or Territory . . . shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory . . ."

³ The Webb-Kenyon Act, 27 U.S.C. § 122, 37 Stat. 699 (1913), provides in pertinent part: "The shipment or transportation, . . . of any . . . intoxicating liquor of any kind, from one State, Territory, or District . . . into any other State, Territory, or District . . . [for the purpose of being] received, possessed, sold, or in any manner used, . . . in violation of any law of any such State, Territory, or District . . . is hereby prohibited."

The Wilson and the Webb-Kenyon Acts have never been repealed, although the power they conferred is incorporated in the Twenty-first Amendment.

of the dormant Commerce Clause did not apply to state regulation of liquor. The ratification of the Twenty-first Amendment in 1933 reserved to each state the power to regulate traffic in intoxicating liquor within its borders. By its express terms, that Amendment "conferr[ed] upon the state the power to forbid all importations [of liquor] which do not comply with the conditions which it prescribes." *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59, 62 (1936).

Appellant challenges the constitutionality of New York's affirmation provisions, which require that distillers importing or selling liquor in the state affirm that the price at which they will sell to New York wholesalers is no higher than the lowest price at which they will sell to any other purchaser. The New York Court of Appeals upheld the constitutionality of these provisions, which do no more than set the terms upon which liquor may be imported or sold in that state, against appellant's dormant Commerce Clause attack. The court held that the provisions were valid under the Twenty-first Amendment.⁴

SUMMARY OF ARGUMENT

New York's affirmation provisions require that distillers importing or selling liquor in New York affirm that the price that they will offer New York wholesalers is no higher than the lowest price at which they will sell to any other purchaser. These provisions are a lawful exercise of the core power reserved to each state by the Twenty-first Amendment, and thus protected from invalidity under the restrictions of the dormant Commerce Clause. Indeed, this Court came to precisely this conclusion almost twenty years ago in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966) (*Seagram I*).

⁴ Except for the above observations, *amici* adopt appellee's statement of the case in its Motion to Dismiss or Affirm.

Appellant's attempts to distinguish this case from *Seagram I*, or, in the alternative, to discredit the analysis in that case, are unpersuasive. Contrary to appellant's repeated assertions, the New York affirmation provisions do not set prices in other states. A distiller selling in New York may reduce its prices in other states; the requirement of the affirmation provisions is merely that, if it does so, it must provide a corresponding reduction to wholesalers in New York.

Nor do the New York provisions either discriminate against interstate commerce or promote an impermissible state interest. Instead, New York regulates evenhandedly to prevent price discrimination against its consumers—a goal squarely within the core power of the Twenty-first Amendment. Finally, appellant's contention that affirmation unduly burdens commerce is not only foreclosed by this Court's prior decisions, but the undisputed record evidence amply demonstrates that affirmation has only an incidental effect on commerce in intoxicating liquors.

This Court should take this opportunity to hold clearly that the dormant Commerce Clause does not limit the state's power under the Twenty-first Amendment. If it imposes any limits at all, it precludes only regulation that discriminates against interstate commerce.

ARGUMENT

I. BY VIRTUE OF THE TWENTY-FIRST AMENDMENT, THE COMMERCE CLAUSE DOES NOT PRECLUDE A STATE FROM REQUIRING THAT DISTILLERS WISHING TO IMPORT OR SELL LIQUOR IN THAT STATE DO SO ONLY AT A PRICE NO HIGHER THAN THAT OFFERED TO ANY OTHER PURCHASER IN THE COUNTRY.

Commerce Clause scrutiny of state regulation of intoxicating liquor must begin with the express reservation to the state of power under Section 2 of the Twenty-first Amendment. That section provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The Court has repeatedly stated that the effect of the Twenty-first Amendment is to "creat[e] an exception to the normal operation of the Commerce Clause." See *Capital Cities Cable, Inc. v. Crisp*, — U.S. —, 104 S.Ct. 2694, 2707 (1984), citing *Craig v. Boren*, 429 U.S. 190, 206 (1976). For more than a half-century since the ratification of the Twenty-first Amendment, this Court has consistently affirmed the scope of the state's reserved power "to restrict, regulate, or prevent the traffic and distribution of intoxicants within its borders": "[B]y virtue of its provisions a state is *totally unconfined by traditional Commerce Clause limitations* when it restricts the importation of intoxicants destined for use, distribution or consumption within its borders." *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964) (emphasis added).⁵ The Court

⁵ See also *Capital Cities Cable*, — U.S. at —, 104 S.Ct. at 2709 ("the central power reserved by § 2 of the Twenty-first Amendment [is the] control over whether to permit importation and sale of liquor and how to structure the liquor distribution system") (citations omitted); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980) ("[t]he Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor");

has termed the state's power to regulate the sale or use of liquor within its borders "the core § 2 power." *Capital Cities Cable*, — U.S. at —, 104 S.Ct. at 2708 (1984).⁶

State regulation in the exercise of this core power, even if it would otherwise violate the Commerce Clause because it burdens interstate commerce, is valid.⁷ Section 2

Seagram I, 384 U.S. at 42; *Hostetter*, 377 U.S. at 330; *Young's Market*, 299 U.S. at 63.

⁶ The scope of the reserved power is not unlimited. This Court has recognized that the Twenty-first Amendment does not foreclose all federal constitutional or statutory challenges to state liquor regulation. Because the Twenty-first Amendment, by its terms, applies only to liquor destined for "delivery or use" within the State, regulation of liquor that is merely passing through a state on its way to some other destination is invalid. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964) (state may not regulate liquor destined for foreign country); *Collins v. Yosemite Park Co.*, 304 U.S. 518 (1938) (state may not regulate liquor destined for national park). Moreover, as an exception to the normal operation of the Commerce Clause, the Twenty-first Amendment left other constitutional obligations undisturbed. See, e.g., *Capital Cities Cable* (Supremacy Clause); *Craig v. Boren* (Equal Protection Clause); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (Due Process Clause); *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964) (Export-Import Clause). Finally, the Twenty-first Amendment neither suspended the operation of statutes enacted pursuant to the Commerce Clause, *California Retail Liquor Dealers* (Sherman Act); *Seagram I* (same); nor divested Congress of its power to enact legislation regulating interstate commerce in intoxicating liquor. *United States v. Frankfort Distillers, Inc.*, 324 U.S. 293 (1945); *William Jameson & Co. v. Morgenthau*, 307 U.S. 171 (1939).

⁷ See *Young's Market*, 299 U.S. at 63:

Surely the state may adopt a lesser degree of regulation than total prohibition. Can it be doubted that a state might establish a state monopoly of the manufacture and sale of beer, and either prohibit all competing importations, or discourage importation by laying a heavy impost, or channelize desired importations by confining them to a single consignee?

See also *Frankfort Distillers*, 324 U.S. at 300 (concurring opinion):

reserves to the states the power to impose burdens on interstate commerce in regulating the conditions upon which liquor may be imported or sold in the state.⁸ *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394 (1939); *Young's Market*, 299 U.S. at 59. Because New York's affirmation provisions do no more than define the terms under which liquor to be consumed in that state may be imported or sold, they are a constitutional exercise of the state's power under the Twenty-first Amendment.

The New York Court of Appeals determined that it was the "declared policy of New York State . . . that it is necessary to regulate and control the manufacture, sale and distribution of alcoholic beverages." *Brown-Forman Distillers Corp. v. State Liquor Authority*, 64 N.Y.2d 479, 486, 479 N.E.2d 764, 767, 490 N.Y.S.2d 128, 131 (1985). To effectuate this policy, New York enacted a comprehensive regulatory scheme governing the importation and sale of intoxicating liquor within its borders. Alcoholic Beverages Control Law ("ABC Law") § 1 *et seq.* This comprehensive scheme includes the requirement that distillers may not sell liquor in the state unless they affirm that the price being offered to New York

As a matter of constitutional law, the result of the Twenty-first Amendment is that a State may erect any barrier it pleases to the entry of intoxicating liquors. Its barrier may be low, high, or insurmountable.

⁸ With one exception, this Court has held that the Twenty-first Amendment absolutely protects state liquor regulation from challenge under the dormant Commerce Clause. In *Bacchus Importers, Ltd. v. Diaz*, — U.S. —, 104 S.Ct. 3049, 3058 (1984), the Court invalidated a state liquor tax that discriminated against interstate commerce in favor of certain domestically produced beverages. The Court held that the discriminatory tax could not stand. *Bacchus* is not controlling here because the New York affirmation provisions do not discriminate against interstate commerce. *Amici* submit that, in any event, *Bacchus* seems irreconcilable with this Court's consistent rejection of dormant Commerce Clause challenges to the states' Twenty-first Amendment power.

wholesalers is no higher than the price currently offered to any other purchaser throughout the country. ABC Law § 101-b(3).

On their face, therefore, New York's affirmation provisions clearly implicate the "core power" reserved to that state by Section 2 of the Twenty-first Amendment, that is, to regulate "the sale or use of liquor within its borders." *Capital Cities Cable*, — U.S. at —, 104 S.Ct. at 2708. Appellant challenges the affirmation provisions solely on the basis of the dormant Commerce Clause's restraints on state regulation.⁹ In light of this Court's clear pronouncements—that when a state acts pursuant to its "core power" under the Twenty-first Amendment to establish the conditions under which liquor may be imported or sold within its borders, it is "totally unconfined by traditional Commerce Clause limitations"—the constitutionality of New York's requirement cannot be seriously doubted.

II. SEAGRAM I CONTROLS THIS CASE.

Almost twenty years ago, in *Seagram I*, this Court rejected a Commerce Clause challenge to New York's prior affirmation provisions. The Court concluded that by virtue of the Twenty-first Amendment, "New York may constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country." *Id.* at 43. The only difference between the prior statute and the one at issue here is the timing of the affirmation. The original law required distillers to affirm that the price offered to New York wholesalers was no higher than that offered to other purchasers during the preceding month (*see* 384 U.S. at 39-40); the

⁹ Nowhere in the extensive briefing of the issue in this case, either in the New York courts or in this Court, has appellant ever contended that New York's affirmation provisions conflict with any federal legislation or with any constitutional imperative other than the Commerce Clause.

present statute requires that prices be affirmed for the current month. The change was designed merely to ensure that New York wholesalers receive the lowest prices currently "offered elsewhere."¹⁰

Appellant does not seriously dispute that state action implicating the core concerns of the Twenty-first Amendment is immune from traditional Commerce Clause attack. *See* Br. for Appellant 31-32. Instead, appellant seeks to avoid the clear command of *Seagram I* on the ground that New York's current statute, by focusing on current prices, no longer implicates the core concerns of the Twenty-first Amendment. Four reasons are offered.

First, appellant contends that New York's statute prospectively controls the price at which liquor may be sold in other states and therefore is outside the Amendment's reservation of power to regulate liquor destined for "use or delivery" within the state. Second, appellant attempts to characterize the New York provisions as "protectionist" and "discriminatory" and thus outside the scope of the Amendment. Third, appellant asserts that New York's affirmation provisions are stripped of constitutional protection because they are not designed to promote temperance. Finally, appellant contends that affirmation provisions unduly burden interstate commerce in intoxicating liquors. These attempts to remove the New York provisions from the core power reserved to the states by the Twenty-first Amendment do not withstand analysis.

A. New York's Affirmation Provisions Do Not Set Prices in Other States.

Appellant flatly asserts that "[t]he New York liquor affirmation statute prospectively controls the prices at

¹⁰ In fact, the change in New York law was made at the urging of numerous distillers who stated that an affirmation of current prices was more workable than past prices. *Joseph E. Seagram & Sons, Inc. v. Gazzara*, 610 F. Supp. 673, 675 n.3 (S.D.N.Y. 1985), *appeal docketed*, No. 85-7547 (2d Cir. July 1, 1985) (*Seagram II*).

which liquor may be sold in all other states." Br. for Appellant 12. In support of this proposition, appellant relies on the Second Circuit's reasoning in *United States Brewers Association v. Healy*, 692 F.2d 275 (2d Cir. 1982), *aff'd mem.*, — U.S. —, 104 S.Ct. 265 (1983).¹¹

In *Healy*, the Second Circuit considered the constitutionality of Connecticut's beer price affirmation statute. That statute required manufacturers and importers of beer ("brewers") to file a monthly price schedule together with an affirmation that the prices listed were no higher than the prices at which the same beer would be sold in the three states adjoining Connecticut during the month that the posting was in effect. Once the schedule had been posted, the brewer essentially could not amend it,¹² or sell beer at prices other than those listed. *Id.* at 276-78.

The Second Circuit asserted that the "obvious effect of the Connecticut statute is to control the minimum price that may be charged by a non-Connecticut brewer to a non-Connecticut wholesaler in a sale outside of Connecticut." *Id.* at 282. The court distinguished *Seagram I* on the ground that the New York provisions at issue there did not control future conduct, but rather only required manufacturers to reflect in New York the prices that had been charged elsewhere. Thus, the Second Circuit reasoned, the retrospective New York provisions, unlike the contemporaneous Connecticut requirement, "did not limit the freedom of a manufacturer at any given time to raise

¹¹ This Court summarily affirmed the judgment of the Second Circuit in *Healy* (— U.S. —, 104 S.Ct. 265 (1983)), thus giving binding effect to the result but not necessarily to the reasoning. See *Mandel v. Bradley*, 432 U.S. 173, 176 (1977); *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975).

¹² The Connecticut statute allowed the brewer to modify the schedule only to meet the lowest price posted by another brewer in Connecticut with respect to beer of like grade and quality. See *Healy*, 692 F.2d at 276-77.

or lower prices in any other state." *Id.* at 283. Based on this distinction, the Second Circuit concluded that the Connecticut statute was not authorized by the Twenty-first Amendment because "[n]othing in [that] Amendment permits Connecticut to set the minimum prices for the sale of beer in any other state." *Id.* at 282. The court invalidated the Connecticut statute according to the traditional Commerce Clause principle that a state may not regulate transactions occurring wholly outside its territory. *Id.* at 283; see also *Baldwin v. GAF Seelig, Inc.*, 294 U.S. 511 (1935).

Appellant contends that the Second Circuit's analysis in *Healy* compels the conclusion that New York's affirmation provisions are similarly outside the scope of the Twenty-first Amendment because they too set a minimum price for liquor sales in other states.¹³ This argument ignores a crucial difference between the New York and Connecticut schemes. The Connecticut statute required current affirmation and allowed no waiver. New York's affirmation provisions, however, specifically allow liquor to be sold in New York at a price other than the posted price if "prior written permission of [the State Liquor Authority] is granted for good cause shown and for reasons not inconsistent with the purpose" of the statute. ABC Law § 101-b(3)(a).¹⁴ Because the State Liquor

¹³ The New York provisions have no effect on maximum prices. A distiller is always free to raise its prices in other states; the New York provisions require only that the price in New York be no higher than that charged in other states.

¹⁴ ABC Law § 101b-(3)(a) provides in pertinent part:

No brand of liquor or wine shall be sold to or purchased by a wholesaler, irrespective of the place of sale or delivery, unless a schedule, as provided by this section, is filed with the liquor authority, and is then in effect. . . . Such brand of liquor or wine shall not be sold to wholesalers except at the price and discounts then in effect unless prior written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter

Authority ("SLA") has the authority to allow liquor sales in New York at prices lower than those initially posted in order to take into account a mid-month price reduction in another state, the New York affirmation provisions in no way inhibit a distiller from reducing its prices in other states at any time; it must merely apply to the SLA for permission to make a corresponding reduction in its New York prices.¹⁵ Thus, any possible invalidity of Connecticut's scheme is irrelevant here, because New York's affirmation provisions have no effect on the minimum price charged for liquor outside of the state's borders.¹⁶

Appellant does not seriously contend that the New York affirmation provisions prevent a distiller willing

¹⁵ The New York affirmation provisions were also challenged in federal district court in New York. That court concluded that, given the purpose of the affirmation provisions—to prevent New York wholesalers from being charged higher prices than the purchasers in other states (*Brown-Forman*, 64 N.Y.2d at 487, 479 N.E.2d at 768, 490 N.Y.S.2d at 132; *Seagram I*, 384 U.S. at 38-40)—“it is difficult to believe that a price reduction in other states does not come within the provision permitting an adjustment to New York prices ‘for good cause shown and for reasons not inconsistent with the purpose’ of the statute.” *Seagram II*, 610 F. Supp. at 678. Indeed, the factual record in *Seagram II* indicates that the SLA interprets the good cause requirement in precisely this fashion. In that case, the SLA ruled that Seagram could not offer its nationwide quality discount plan to New York wholesalers. The SLA did not suggest that it would or could require Seagram to forgo its plan in other states. Instead, the SLA simply required that Seagram offer a cash discount in New York equivalent to the value of its quality discount program in other states. *Seagram II*, 610 F. Supp. at 678 n.5.

¹⁶ Indeed, the district court in *Seagram II*, bound by both the result and the reasoning of *Healy*, came to precisely this conclusion regarding the constitutionality of New York's current affirmation provisions. Relying on the “good cause” provision, the court concluded that the New York provisions did not mandate minimum prices in other states. 610 F. Supp. at 678. It therefore declared that *Healy* was inapplicable, and, under this Court's holding in *Seagram I*, held the New York provisions constitutional. *Ibid*.

to lower its prices in New York from lowering prices in other states at any time.¹⁷ Indeed, it is precisely *because* distillers must make a corresponding reduction in their New York prices whenever granting a price reduction elsewhere that appellant contends the New York statute is unconstitutionally burdensome.¹⁸ Therefore, it is clear that what appellant is really arguing is not that New York's affirmation provisions *prohibit price reductions in other states*, the rationale supporting *Healy*, but rather that they *require price reductions in New York* if such price reductions are made elsewhere.¹⁹ *Healy* does not support appellant's argument. Although the Second Circuit concluded that it was unconstitutional for Connecticut to prevent brewers from lowering their prices in other

¹⁷ Appellant asserts, in its Opposition to the Motion to Dismiss or Affirm, at 4, that a state agency's discretion cannot save an otherwise unconstitutional law. *Seagram I* provides a sufficient answer to this contention. The Court noted the SLA's power under the “good cause” exception and stated that it “[could] not presume that the Authority will not exercise that discretion to alleviate any friction” between the ABC law and federal law (in that context, the Sherman Act). 384 U.S. at 46. Appellant's assertion, in any event, begs the question in this case. Appellant's contention is that the New York provisions are unconstitutional because a distiller cannot lower his prices in another state without violating New York law. If, however, by virtue of § 101-b(3) (a), a distiller *may* lower prices in other states at any time without violating New York law, the claimed constitutional infirmity disappears.

¹⁸ See Br. for Appellant 17 (“To respond [to a price reduction by a competitor], a supplier subject to affirmation in several states must be willing and able to absorb the cost of simultaneously lowering its price . . . in all the affirmation states where it does business.”).

¹⁹ Setting the price at which liquor is sold in New York is clearly within the state's power under the Twenty-first Amendment even if, as appellant alleges, distillers will be discouraged from making price reductions in other states because of the cost of duplicating these discounts in New York. As we discuss below, this Court's decision in *Seagram I* forecloses this argument. See pp. 16-17, *infra*.

states, it found no objection to the simple requirement that brewers duplicate their out-of-state prices in Connecticut:

[g]iven the latitude allowed a state under the Twenty-first Amendment to regulate the sale of liquor within its own borders, the holding in *Seagram* [I] might well validate beer price regulation less intrusive than the present Connecticut statute, such as a requirement simply that a brewer set its Connecticut prices at the lowest levels it chooses to set in the surrounding states . . . , leaving those out-of-state prices unregulated by Connecticut.

692 F.2d at 283-84.

New York's affirmation provisions do not control the price at which distillers may sell liquor in other states; they merely require that any price reduction offered in those other states be reflected in the price charged to wholesalers in New York if the distiller is going to sell in New York.²⁰ As a regulation of the terms on which liquor may be sold in the state, the New York provisions are within the core power of the state protected by the Twenty-first Amendment from the limitations of the dormant Commerce Clause.

B. New York's Affirmation Provisions Do Not Discriminate Against Interstate Commerce.

Appellant next contends that New York's affirmation statute is not a valid exercise of the state's power under the Twenty-first Amendment because it is protectionist and discriminates against interstate commerce. In *Bacchus Imports, Ltd. v. Diaz*, — U.S. —, 104 S.Ct. 3049, 3058 (1984), this Court held that liquor regulation that discriminates against interstate commerce is not saved from invalidity by the Twenty-first Amendment. In *Bacchus*, the Court held that a Hawaii liquor tax that ex-

²⁰ Of course, the distiller who does not wish to make price reductions in New York to correspond to price reductions elsewhere need not continue to sell liquor in New York.

empted certain domestically produced beverages amounted to "simple economic protectionism" and was therefore outside the reserved power of the Twenty-first Amendment.²¹

New York's affirmation provisions do not discriminate against interstate commerce. In contrast to the enactments struck down by this Court as constituting "mere economic protectionism" (*Bacchus*, — U.S. at —, 104 S.Ct. at 3058), New York's affirmation provisions are patently nondiscriminatory in both purpose and effect. There is no indication that the New York provisions were enacted for the purpose of promoting local businesses. See *Baldwin v. GAF Seelig, Inc.*, 294 U.S. 511 (1935).²² Moreover, New York's comprehensive scheme for the regulation of liquor neither promotes local trade by for-

²¹ *Bacchus* does not appear to be reconcilable with this Court's other cases construing dormant Commerce Clause restrictions on state liquor regulation. This Court has held that the Twenty-first Amendment "created an exception to the normal operation of the Commerce Clause." *Capital Cities Cable*, — U.S. at —, 104 S.Ct. at 2107, quoting *Craig v. Boren*, 429 U.S. at 206. That exception clearly extends to regulations that would otherwise burden interstate commerce. E.g., *Seagram I*. Discriminatory state regulation should not be treated any differently. See *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391 (1939); *Joseph S. Finch & Co. v. Burk*, 305 U.S. 395 (1939); *Young's Market*, 299 U.S. at 62.

²² In this respect also, the New York's affirmation provisions are distinguishable from the Connecticut law struck down in *Healy*. In *Healy*, it was conceded that Connecticut's affirmation law was enacted for the purpose of "lower[ing] the retail price of beer in Connecticut, thereby increasing the purchase of beer by Connecticut residents within the state and generating increased tax revenues for the state" (692 F.2d at 276), although the Second Circuit did not rely on the discriminatory legislative purpose in invalidating the Connecticut statute. This Court's affirmance without opinion provides no indication of the basis for its decision. Cf. *Bacchus Imports Ltd. v. Diaz*, — U.S. —, 104 S.Ct. at 3049, 3055 (1984); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 352-53 (1977).

bidding or discouraging importation of products from other states (*see, e.g., Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977)), nor seeks to give local residents a preference in, or exclusive access to, products produced within the state (*see, e.g., New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982)). Instead, the New York provisions merely set the conditions by which members of the liquor industry (whether local or out-of-state) may avail themselves of the privilege of selling within the state. As such, they are the kind of regulation of traffic in liquor that the Twenty-first Amendment protects.

Appellant tries to divert attention from the evident evenhandedness of New York's statutory scheme by contending that the affirmation requirement is protectionist because it was enacted "solely for the purpose of achieving the lowest prices for New York consumers." Br. for Appellant 24. *Seagram I* clearly forecloses an argument of protectionism based on this ground. In *Seagram I*, this Court explicitly held that New York had not acted unconstitutionally in seeking to protect its consumers from price discrimination by distillers:

The announced purpose of the legislature [in enacting the affirmation provisions] was to eliminate "discrimination against and disadvantage of consumers" in the State. . . . We cannot say that the legislature acted unconstitutionally when it determined that only by imposing the relatively drastic "no higher than the lowest price" requirement . . . could the grip of the liquor distillers on New York liquor prices be loosened. In a variety of cases in areas no more sensitive than that of liquor control, this Court has upheld state maximum price legislation.

Seagram I, 384 U.S. at 47-48 (footnotes and citations omitted). Consistent with this test, the New York Court of Appeals expressly found that the purpose of the affirmation provisions was to end discrimination against New

York consumers. *Brown-Forman*, 64 N.Y.2d at 487, 479 N.E.2d at 768, 490 N.Y.S.2d at 132.

Moreover, this Court has never held that state legislation is *per se* invalid simply because the state seeks to prevent price discrimination against its residents, and the adoption of such an expansive definition of protectionism would be unwise. As the court noted in *Seagram II*: "It is a rare statute that does not seek to benefit local residents, and the qualifying phrase 'at the expense of residents in other states' is far too vague to describe a category of statutes that are considered virtually unconstitutional *per se*." *Seagram II*, 610 F.Supp. at 680.

Therefore, because the purpose of New York's affirmation provisions has remained unchanged since *Seagram I*,²³ and appellant has offered no indication that the change from a retrospective affirmation to a current one heightens the discriminatory character of the New York provisions, appellant's attempt to show their invalidity as discriminatory state regulation must be rejected.

C. Temperance Is Not the Only Legitimate Goal of the Twenty-first Amendment.

Appellant's third attempt to eliminate the Twenty-first Amendment's protection of New York's affirmation provisions rests on the assertion that the provisions were not enacted to promote temperance. This basis for a challenge, having been rejected by this Court in *Seagram I*, deserves short shrift. In upholding the constitutionality of New York's retrospective affirmation provisions, the *Seagram I* Court specifically rejected the notion that temperance was a necessary goal of legislation under the

²³ Although the findings and conclusions of the New York Court of Appeals concerning the legislative purpose behind the affirmation provisions may not be binding on this Court, such findings are "customarily accepted . . . in the absence of exceptional circumstances." *California Retail Liquor Dealers*, 455 U.S. at 111 (citations omitted).

Amendment. *Bacchus*, this Court's most recent decision construing the Twenty-first Amendment, also recognizes that the laws entitled to deference under the Amendment are those "enacted to combat the perceived evils of an unrestricted traffic in liquor." — U.S. at —, 104 S.Ct. at 3058. Thus, valid liquor regulation may be "designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment." — U.S. at —, 104 S.Ct. at 3058-59.²⁴

The undisputed evidence demonstrates that New York's affirmation provisions were enacted to combat one of the major "perceived evils of an unrestricted traffic in liquor": price discrimination. Price discrimination by distillers, in the form of secret discounts, rebates, "tied houses," and other special concessions and arrangements, was of major concern to the states even before the ratification of the Eighteenth Amendment. Such concerns, in fact, contributed to its ratification.²⁵ After the repeal of Prohibition by Section 1 of the Twenty-first Amendment, these discriminatory practices again flourished.²⁶ New York and other states adopted price affirmation and other similar requirements to combat these "perceived evils."²⁷

²⁴ In *Seagram I*, the Court stated:

[n]othing in the Twenty-first Amendment or any other part of the Constitution requires that state laws regulating the liquor business be motivated exclusively by a desire to promote temperance.

384 U.S. at 47 (footnote omitted). *Accord*, *Young's Market*, 299 U.S. at 63 (rejecting contention that the "state may not regulate importations except for the purpose of protecting the public health, safety, or morals").

²⁵ See Byse, *Alcoholic Beverage Control Before Repeal*, 7 Law & Contemp. Prob. 544, 564 (1940).

²⁶ See de Ganahal, *Trade Practice & Beverage Control in the Alcoholic Beverage Industry*, 7 Law & Contemp. Prob. 664, 666 (1940).

²⁷ See *id.* at 677; *Seagram I*, 384 U.S. at 39, 47-48; *Brown-Forman*, 64 N.Y.2d at 487, 479 N.E.2d at 768, 490 N.Y.S.2d at 132.

Thus, New York's affirmation provisions fall squarely within the state's Twenty-first Amendment power.

D. New York's Affirmation Provisions Are Not Invalid as an Undue Burden on Interstate Commerce.

Stripped of its rhetorical references to extraterritoriality, discrimination, and improper motivation, the essence of appellant's argument is that by requiring distillers to offer New York wholesalers the lowest price offered elsewhere, New York has impermissibly burdened interstate commerce in liquor. Specifically, appellant contends that it is precluded from cutting its prices in a particular locale to respond to regional competition or seasonal demand because of the cost of making a corresponding reduction in its prices in New York. Thus, the argument concludes, New York's affirmation provisions have distorted "free competition" in the national liquor market and therefore unreasonably burden interstate commerce. See, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (mandating balancing test for evenhanded state regulation affecting interstate commerce).

This argument finds no support in either law or fact. First, appellant's claim is foreclosed by this Court's consistent line of decisions holding that legislation implicating the core power reserved to the states by the Twenty-first Amendment is immune from invalidation under the Commerce Clause even if it burdens commerce. Because New York's affirmation provisions simply regulate the price at which liquor may be imported or sold in that state, they are absolutely protected. An allegation that such provisions unduly burden commerce is irrelevant because they are not subject to the balancing analysis applied to state regulation of other articles of commerce.

Appellant mistakenly relies on this Court's statement in *California Retail Liquor Dealers* (445 U.S. at 109), that a "pragmatic effort [must be made] to harmonize

state and federal powers." Br. for Appellant 33. This language does not mandate a balancing test for state regulation challenged under the dormant Commerce Clause. *California Retail Liquor Dealers* involved a Supremacy Clause challenge to state liquor regulation because of a potential conflict with the Sherman Antitrust Act.

Even if a balancing test were required, appellant could not prevail because *Seagram I* clearly foreclosed the claim that affirmation unduly burdens commerce. New York's affirmation scheme imposes no greater burden than did the retrospective provisions upheld in *Seagram I*. Under either statute, appellant is free to lower its prices in California, for example, to reflect regional competition. It simply must also offer a similar reduction in New York. The only difference between the two statutes is the timing of the reduction in New York. Appellant has offered no evidence from which this Court could conclude that the timing of the mandated reduction in New York has any constitutional significance; and amici submit that there is none. See *Seagram II*, 610 F. Supp. at 678 ("despite the fact that the amended New York affirmation statute has been in effect for eighteen years, plaintiff has not suggested how that statute has, in practice, proved more burdensome than the statute as originally enacted").

Appellant tacitly concedes that the claim of undue burden was decided adversely to it in *Seagram I*, but argues that the case might be "decided differently today" because of the fact that twenty other states have now adopted affirmation statutes. Br. for Appellant 30 n.14.²⁸ An examination of the reasoning of *Seagram I* in light of the realities of interstate commerce in liquor, however, amply

²⁸ Some of appellant's amici are even more forthright in their claim that *Seagram I* should be overruled. See, e.g., Brief of the Distillers Somerset Group, Inc., as amicus curiae, at 16-21.

demonstrates the wisdom and continued vitality of that decision.²⁹

An assessment of the impact that affirmation provisions such as New York's have on interstate commerce in liquor must take into account the national liquor pricing system that has evolved from the Twenty-first Amendment. In eighteen states, the states themselves, and not private parties, sell liquor. By virtue of their enormous purchasing power, these states have an overwhelming impact on liquor prices.³⁰ As a result, these states have, since the late 1930's, insisted that distillers from whom they purchase affirm that the price charged the state is no higher than the lowest price at which they sell to any other purchaser (see *Seagram I*, 384 U.S. at 43-45), the identical restriction imposed by the New York affirmation provisions.

²⁹ It is significant that in presenting its argument that affirmation provisions unreasonably burden interstate commerce, appellant does not rely on a single case concerning state regulation of alcoholic beverages. (Appellant cites *Healy* only in support of its contention that the New York statute unconstitutionally sets prices in other states. As demonstrated above, this argument has no merit.) Instead, appellant relies on cases concerning Commerce Clause limitations on state regulation of traditional items of commerce such as milk and electric power. See, e.g., *Baldwin v. GAF Seelig, Inc.*, 294 U.S. 511 (1935) (milk); *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982) (electric power). It is, however, beyond question that the rules governing trade in liquor are simply not the same as those governing "trade in bicycles, or cosmetics or furniture." *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 16 N.Y.2d 47, 56, 209 N.E.2d 701, 262 N.Y.S.2d 75 (1965), *aff'd*, 384 U.S. 35 (1966). This Court has repeatedly affirmed that the Twenty-first Amendment "reserves to the States power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause." *Capital Cities Cable*, — U.S. at —, 104 S.Ct. at 2707; see *Young's Market*, 299 U.S. at 62-63.

³⁰ At the time of this Court's decision in *Seagram I*, for example, the Commonwealth of Pennsylvania was the largest purchaser of liquor in the world, with a yearly volume of almost \$400,000,000. *Seagram I*, 384 U.S. at 44 n.14.

As this Court acknowledged in *Seagram I*, the contracts that distillers have freely entered into with the market participant states are material to the determination whether affirmation unduly burdens interstate commerce in liquor. *Id.* As a consequence of these *voluntary contractual commitments* a distiller must take account of the tremendous financial impact that lowering its prices in any state will have on the price that it must then offer to the eighteen market participant states. In light of this restraint on lowering prices, to which the distillers voluntarily agree, New York's affirmation provisions pose at most an incidental burden on commerce.³¹

Whatever slight burden there may be is further diminished by the myriad additional state and federal regulations, other than affirmation, governing liquor prices. For example, many states, including New York, require that liquor prices be posted in advance and that sales for the month that the posting is in effect cannot deviate from the scheduled price absent special permission. *See* ABC Law § 101b(3)(a); *see also* Mass. Code Anno. C. 138 § 25B(d) and 25D. Such laws have been upheld as valid pursuant to the state's authority under the Twenty-first Amendment. *See Battipaglia v. New York State Liquor Authority*, 745 F.2d 166 (2d Cir. 1984), *cert. denied*, — U.S. —, 105 S.Ct. 1393 (1985).

In addition, since 1935, the federal government has exercised considerable control over the price of liquor. The Federal Alcohol Administration Act of 1935 (27 U.S.C. 201 *et seq.*, 49 Stat. 977 (1935)), prohibits, *inter alia*, exclusive outlets, "tied houses," and consignment sales. 27 U.S.C. § 205(a), (b) and (d). Such restrictions

³¹ This Court has twice before held that the Twenty-first Amendment allows a state to protect itself from discrimination by another state. *See Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391 (1939) (upholding Michigan "retaliation" statute preventing sale of beer manufactured in states that discriminated against Michigan beer); *Joseph S. Finch & Co. v. Burk*, 305 U.S. 395 (1939) (similar).

have a significant impact on the prices at which liquor is sold around the country. Indeed, the discount program that gave rise to this litigation required the express approval of the Bureau of Alcohol, Tobacco, and Firearms prior to its introduction in any state. In addition, the Bureau's authorization of this program was expressly conditioned upon appellant's promise to keep the discount program in effect for one year regardless of any fluctuation in the price charged by appellant for its products.

In sum, the benefits to consumers of "free competition" in the sale of liquor is purely illusory. Even in the absence of affirmation statutes, the price of liquor would remain tightly controlled. At most, therefore, New York's affirmation provisions impose an incidental burden on interstate commerce in liquor. This burden, if any, is constitutionally acceptable even under the test that appellant proposes. *See, e.g., Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981); *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

III. IF STATE REGULATION OF LIQUOR DESTINED FOR DELIVERY OR USE WITHIN THE STATE IS NOT ABSOLUTELY IMMUNE FROM CHALLENGE UNDER THE DORMANT COMMERCE CLAUSE, IT SHOULD NOT BE INVALIDATED MERELY ON THE BASIS THAT IT BURDENS INTERSTATE COMMERCE.

From the foregoing, it is clear that New York's affirmation statute is a constitutional exercise of its core power under the Twenty-first Amendment to dictate the terms upon which liquor may be imported or sold in the state. Consequently, this Court's decisions establish that it is immune from attack under the dormant Commerce Clause.

This Court's occasional references to the need to "harmonize state and federal" interests in liquor regulation (*Capital Cities Cable*, — U.S. at —, 104 S.Ct. at 2708) have apparently led some courts (including the New York Court of Appeals in this case, *Brown-Forman*, 64 N.Y.2d at 486, 479 N.E.2d at 767-68, 490 N.Y.S.2d at 131-32), to apply a balancing test, similar to the one set out in *Pike v. Bruce Church, Inc.* (397 U.S. 137 1970)), that weighs the state interest in liquor regulation against the resulting burden on interstate commerce.

This Court has not applied a balancing test to this type of liquor regulation. *Amici* therefore submit that the Court should clearly articulate that regulation under the Twenty-first Amendment need not undergo a balancing test for validity under the dormant Commerce Clause.

If, however, the Court determines that the affirmation provisions are not absolutely immune from Commerce Clause restriction, *amici* submit that the balancing test is not appropriate. State liquor regulation should be struck down under the dormant Commerce Clause (if at all) only if it discriminates against interstate commerce.³²

Amici have elsewhere argued at some length that the balancing test set forth in *Pike* is inconsistent with this Court's current view of its role in federalism disputes and should therefore be abandoned. See Brief *Amici Curiae* of the National Governors' Association, *et al.*, in support of Appellees in *Transcontinental Gas Pipeline Corporation v. State Oil & Gas Board of Mississippi, et al.*, No. 84-1076, at 21-28 (hereinafter *Transco* Brief). *Amici* there contended that *Pike* should be abandoned because it is incompatible with this Court's current view

³² *Amici* submit that even discriminatory liquor regulation should be valid under the Twenty-first Amendment exception to the operation of the dormant Commerce Clause, although we recognize that *Bacchus* holds to the contrary. If immunity is rejected, however, and the Court employs some Commerce Clause test, *amici* submit that the test should require discrimination, not mere burden.

of the proper role of the judiciary; is no longer necessary to protect the paramount interest in free trade; requires courts to engage in policy making; and casts a cloud on state regulatory legislation. *Transco* Brief at 22-27.

As an alternative to *Pike*, *amici* urged this Court to hold that discrimination is the touchstone of Commerce Clause review. If a state regulates evenhandedly to achieve a legitimate state interest, that regulation should not be subject to judicial attack on the ground that it "excessively burdens" commerce. Instead, the determination when evenhanded state regulation unduly burdens interstate commerce should be left to state legislatures and to Congress, both of which are better equipped than courts to resolve these essentially political questions.

Amici submit that the arguments in favor of making discrimination the necessary touchstone of all attacks on state legislation under the Commerce Clause have even greater force when applied to state regulation of liquor, which has been expressly reserved to the states. Thus, the states may restrict interstate commerce in liquor to achieve their own legitimate regulatory objectives. The federal interest in liquor regulation is adequately protected by Congress' power to enact legislation pursuant to the Commerce Clause and, if not, certainly by the additional requirement that state regulation be nondiscriminatory.

In sum, although this Court has held that state legislation enacted pursuant to the core power under the Twenty-first Amendment to establish the conditions upon which liquor may be imported or sold in a state is protected from invalidation under the dormant Commerce Clause, confusion in the lower federal courts and state courts has resulted in a proliferation of challenges to state liquor regulation. Therefore, *amici* respectfully submit that, in upholding New York's affirmation provisions, this Court should hold clearly that state regulation of liquor

destined for delivery or use within the state is free from any restriction by the dormant Commerce Clause. In the alternative, this Court should hold that nondiscriminatory state regulation of liquor destined for delivery or use within the state is valid under the dormant Commerce Clause. Whatever justification there might be for requiring courts to balance the federal interest in a national economy against the legitimate goals of state economic regulation in other contexts, it is insufficient in the context of liquor regulation. *Amici* respectfully submit, in any event, that the justification for a balancing test in any context under the Commerce Clause has long since vanished, if ever it existed at all.

CONCLUSION

For the foregoing reasons, the judgment of the New York Court of Appeals should be affirmed.

Respectfully submitted,

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